12-167

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~986.~~ 637

THE IVANHOE MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE KEYSTONE CONSOLIDATED MINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED 15th OCTOBER, 1879.

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No. 986.

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1 United States of America, ss: The President of the United States of America to the judges of the Circuit Court of the United States of the Ninth Judicial Circuit in and for the District of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, between Ivanhoe Mining Company, plaintiff in error, and The Keystone Consolidated Mining Company, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court, to be there and then held that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, chief justice of the Supreme Court of the United States, this 9th day of September, in the year of our Lord one thousand eight hundred and seventy-nine, and of the independence of the United States the 104th.

[SEAL.]

The above writ of error is hereby allowed.

LOREZNO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

Attest, &c.:

L. S. B. SAWYER,
Clerk of U. S. Circuit Court, Cal.
By J. F. O'BEIRNE, *Depy. Clk.*

The answer of the judges of the Circuit Court of the United States for the District of California:

The record and proceedings of the plaint whereof mention is within made, with all things touching the same, we certify, under the seal of our said court, to the Supreme Court of the United States, within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[SEAL.]

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

(Endorsed:) 1454; United States Supreme Court; Ivanhoe Mining Company *vs.* The Keystone Consolidated Mining Company;

writ of error; filed September 9, A. D. 1879; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dpy. clk.

United States of America, ss: To the Keystone Consolidated Mining Company, defendant in error, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1879, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of California, wherein the Ivanhoe Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, chief justice of the Supreme Court of the United States of America, this 9th day of September, A. D. 1879, and of the independence of the United States the one hundred and fourth. [SEAL.]

LORENZO SAWYER,
United States Circuit Judge, Ninth Circuit.

(Endorsed:) United States Supreme Court; Ivanhoe Mining Company *vs.* The Keystone Consolidated Mining Company; *citation;* filed 9th September, A. D. 1879; L. S. B. Sawyer, clerk; by J. F. O'Beirne, depy. clk.

Personal service of the within, by copy, at San Francisco, California, is hereby admitted this ninth day of September, 1879, not waiving any objection to the writ of error or to the party by whom the same is sued out.—Geo. A. Nourse, attorney for Consolidated Mining Co.

In the District Court of the 12th Judicial District in and for the City and County of San Francisco, State of California.

DANIEL W. GILLETT, Plaintiff, *vs.* THE KEYSTONE CONSOLIDATED MINING COMPANY, JOHN DOE, AND RICHARD ROE, Defendants.	Complaint.	At law.

Complaint.

Daniel W. Gillett brings this action against defendants above named, and avers and charges:

I.

That the true names of the defendants John Doe and Richard Roe are unknown to plaintiff; they are sued as persons who are in

the actual possession of the lands hereinafter described as the superintendent and employé of defendant, The Keystone Consolidated Mining Company.

2

II.

That defendants, The Keystone Mining Company, is and at all times herein mentioned was a mining corporation, organized and existing under the laws of the State of California.

III.

That on the 27th day of March, A. D. eighteen hundred and seventy-two, plaintiff was, ever since has been, and still is the owner in fee-simple and entitled to the possession of all and singular that certain tract of land situate in the county of Amador, State of California, to wit, the east half of section (36) thirty-six, in township seven (7) north, range ten (10) east, Mount Diablo meridian.

IV.

That said lands were granted by the United States to the State of California under and by virtue of the act of the Congress of the United States approved March 3, 1853, entitled "An act to provide for the survey of the public lands in California, the granting

3 of pre-emption rights therein, and for other purposes."

V.

That said lands were afterwards, to wit, March 26, 1872, segregated from the public lands of the United States. That thereafter, to wit, on the 27th day of March, A. D. 1872, the said State of California granted and conveyed said lands to plaintiff, who has not conveyed the same.

VI.

That on the said 27th day of March, 1872, the said defendants, against the will of plaintiff, entered upon the said lands and premises and ousted and ejected plaintiff from the possession thereof, and from thence hitherto have detained and withheld the possession thereof from plaintiff, and still do detain and withhold possession of the same from plaintiff.

VII.

That defendants have, between said 27th day of March, 1872, and March 26, 1874, dug out and removed from beneath the sur-

4 face of said lands gold-bearing quartz and gold minerals of the value of $288,000, and are still taking out such quartz and minerals of great value.

Wherefore plaintiff demands judgment against defendants for possession of said lands and that he recover and be restored to the possession thereof. Also for damages in the sum of $500,000.00 and costs of this action.

WM. H. PATTERSON,
Attorney for Plaintiff.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Wm. H. Patterson, being sworn, says: I am an attorney at law, and attorney for plaintiff named in the foregoing complaint. Said plaintiff is not within the State of Califarnia. I have read the foregoing complaint. The same is true of my own knowledge, except as to the matters therein stated on the information or belief of
5 plaintiff and myself, and as to those matters I believe it to be true.

WM. H. PATTERSON.

Sworn to before me March 25, 1874.

RAMON DE ZALDO,
[SEAL.] *Notary Public.*

(Endorsed:) Filed March 25th, 1874; William Harvey, clerk; by J. D. Ruggles, dep. clerk.

In U. S. Circuit Court, Dist. of Cal.; filed 13th Dec., 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep. cl'k.

In the District Court of the Twelfth Judicial District of the
6 State of California, in and for the City and County of San Francisco.

D. W. GILLETT
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY *et al.*

Affidavit of H. D. Lammot to Summons.

H. D. Lammot, being sworn, says he is a citizen of the United States, over the age of twenty-one years, and not interested in the above-entitled action; that he served the summons in said action on the sixth (6) day of April, 1874, upon the Keystone Consolidated Mining Company, one of the therein-named defendants, by delivering to Frank Swift, secretary of said defendant, personally, in the city and county of San Francisco, a copy of said summons attached to a copy of the complaint in said action therein named.

H. D. LAMMOT.

7 Dated San Francisco, April 6, 1874.

Subscribed and sworn to before me this 7th day of April, 1874.

JOHN H. HARVEY,
Deputy County Clerk.

(Endorsed:) Filed April 7, 1874; Wm. Harvey, clerk; by J. D. Ruggles, dep. clerk.

In U. S. Circuit Court, Dist. of Cal.; filed December 13, 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep. cl'k.

8 In the District Court of the Twelfth Judicial District of the State of California, in and for the City and County of San Francisco.

DANIEL W. GILLETT, Plaintiff,
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY *et al.*, Defendants.

Action brought in the District Court of the Twelfth Judicial District of the State of California, in and for the city and county of San Francisco, and the complaint filed in said city and county of San Francisco, in the office of the clerk of said District Court.

Summons.

The people of the State of California send greeting to the Keystone Consolidated Mining Company, John Doe, and Richard Roe, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the District Court of the Twelfth Judicial District of the State of California, in and for the city
9 and county of San Francisco, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this county but in this district, within twenty days; otherwise within forty days, or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover from you the possession of that certain tract of land situate in Amador county, California, to wit, the east half of section 36, in township seven (7) north, range ten east, Mount Diablo meridian, and that plaintiff recover and be restored to the possession thereof, and recover damages in the sum of $500,000.00, for the ouster of plaintiff therefrom, and for the alleged unlawful detention and withholding thereof, and for the products of the same alleged to have been wrongfully abstracted by you
10 therefrom, and for his costs of action.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief demanded in the complaint.

Given under my hand and seal of the District Court of the Twelfth Judicial District of the State of California, in and
[SEAL.] for the city and county of San Francisco, this 25th day of March, in the year of our Lord one thousand eight hundred and seventy-four. WILLIAM HARVEY, *Clerk.*
By J. D. RUGGLES, *Deputy Clerk.*

(Endorsed:) Office of the sheriff of the county of Amador. I hereby certify that I received the within summons on the
11 thirtieth day of March, A. D. 1874, and personally served the

same on the thirty-first day of March, A. D. 1874, upon the Keystone Consolidated Mining Company *et als.*, said defendants, by delivering to O. C. Hewitt, superintendent of the Keystone Consolidated Mining Company's mine, and to I. N. Templeton, superintendent of the Keystone Consolidated Mining Company's mill, each personally, in the county of Amador, a copy of said summons, attached to a copy of the complaint in said action therein named. Dated at Jackson this 31st day of March, 1874. — Peter Fagan, sheriff, by Robert Aitken, deputy sheriff.

Filed April 4, 1874; William Harvey, clerk; by H. W. Kind, deputy clerk.

In U. S. Circuit Court, Dist. of Cal'a; filed Dec. 13, 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep. cl'k.

12 In the District Court of the Twelfth Judicial District of the State of California, in and for the City and County of San Francisco.

D. W. GILLETT, Plaintiff,
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY *et als.*, Defendant.

Stipulation Extending Time to Answer.

Defendants have twenty days additional to plead or take such other action as they may be advised by counsel in above action.

WM. H. PATTERSON,
Attorney for Plaintiff.

San Francisco, April 14, 1874.

13 (Endorsed:) Filed April 15, 1874; Wm. Harvey, clerk; by J. D. Ruggles, dep. clerk.

In U. S. Circuit Court, Dist. of Cal.; filed Dec. 13, 1875; L. S. B. Sawyer, clk.; by J. F. O'Beirne, dep'y clk.

14 In the District Court of the Twelfth Judicial District of the State of California, in and for the City and County of San Francisco.

DANIEL W. GILLETT, Plaintiff,
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY *et als.*

Notice of Appearance, &c.

SIR: Please take notice that I am retained by and appear for the defendants in the above-entitled action, and demand that service be

made upon me of all papers in said action, to service of which said defendants are entitled.

April 22, 1874.

Yours, &c., GEO. A. NOURSE,
Attorney for Defendants.
306 Pine St., S. F.

To W. H. PATTERSON,
Attorney for Plaintiff.

15 (Endorsed:) I admit personal service of the within, at San Francisco, this 24th day of April, 1874; W. H. Patterson, attorney for plff.; filed April 24, 1874; Wm. Harvey, clerk; by J. D. Ruggles, dep. clk.

In U. S. Circuit Court, Dist. of Cal.; filed Dec. 13, 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep. clk.

16 In the District Court of the Twelfth Judicial District of the State of California in and for the City and County of San Francisco.

DANIEL W. GILLETT, Plaintiff,
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY *et als.*, Defendants.

Order that plaintiff show cause, &c.

On motion of Geo. A. Nourse, Esq., the attorney for the defendants herein, and on the complaint on file in the action, it is hereby ordered that the plaintiff show cause before this court, at the court-room thereof, in the city and county of San Francisco, on Friday, the first day of May, 1874, at the opening of court on that day, or as soon thereafter as counsel can be heard, why the subdivisions
17 or paragraphs of said complaint designated "IV" and "V," and each of them, should not be stricken out, on the grounds that said subdivisions or paragraphs are and each of them is irrelevant, redundant, and immaterial.

And it is further ordered that a copy of this order be served on plaintiff's attorney at least five days before the said first day of May, 1874, and that the defendants have ten days after the decision upon this order in which to plead to said complaint.

April 24, 1874. J. R. SHARPSTEIN,
Dist. Judge.

(Endorsed:) Personal service of copy hereof admitted April 24, 1874; W. H. Patterson, plff's atty.; filed April 24, 1874; William Harvey, clerk; by J. D. Ruggles, deputy clerk; in U. S.
18 Circuit Court, Dist. of Cala.; filed Dec. 13th, 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep. clk.

19 In the District Court of the Twelfth Judicial District of the State of California, in and for the City and County of San Francisco.

October Term.—Friday, November 13, 1874.

Present: Hon. J. R. Sharpstein, judge.

D. W. GILLETT, Plaintiff,
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY, Defendant.

Order that motion to strike out paragraphs 4 and 5 of Complaint be granted.

Upon motion of Mr. Nourse, counsel for the defendant, Mr. Patterson, counsel for plaintiff, consenting thereto, it is ordered that the motion to strike out paragraphs 4 and 5 of said complaint be granted.

20 (Endorsed:) In U. S. Circuit Court, Dist. of Cala.; filed Dec'r 13th, 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep'y clk.

21 In the District Court of the Twelfth Judicial District, in and for the City and County of San Francisco, State of California.

DANIEL W. GILLETT, Plaintiff,
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY, Defendant. } Complaint. At law.

Complaint.

Daniel W. Gillett brings this action against defendant above named, and avers and charges:

I.

That defendant, the Keystone Consolidated Mining Company, is, and at all times herein mentioned was, a mining corporation, organized and existing under the laws of the State of California.

II.

22 That on the 27th day of March, A. D. eighteen hundred and seventy-two, plaintiff was, ever since has been, and still is the owner in fee-simple and entitled to the possession of all and singular that certain tract of land situate in the county of Amador, State of California, to wit, the east half of section thirty-six (36), in township seven (7) north, range ten (10) east, Mount Diablo meridian.

III.

That on the said 27th day of March, 1872, the said defendant, against the will of plaintiff, entered upon the said lands and premises and ousted and ejected plaintiff from the possession thereof, and from thence hitherto has detained and withheld the possession thereof from plaintiff, and still doth detain and withhold the possession of the same from plaintiff.

IV.

That defendant has, between said 27th day of March, 1872, and March 26th, 1874, dug out and removed from beneath the
23 surface of said lands gold-bearing quartz and gold minerals of the value of $288,000, and are still taking out such quartz and minerals of great value.

Wherefore plaintiff demands judgment against defendant for possession of said lands and that he recover and be restored to the possession thereof. Also for damages in the sum of $500,000, and costs of this action.

W. H. PATTERSON, *Att'y for Plaintiff.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

William H. Patterson, being sworn, says: I am an attorney at law, and attorney for plaintiff named in the foregoing complaint. Said plaintiff is not within the State of California. I have read the foregoing complaint. The same is true of my own knowledge, except as to the matters therein stated on the information or belief of plaintiff and myself, and as to those matters I believe it to be true.
24 WM. H. PATTERSON.

Sworn to before me this 5th day of Febr'y, 1875.

SAM'L S. MURFEY.

[SEAL.] *Notary Public.*

(Endorsed:) Service of within is hereby admitted this 5th day of February, 1875; Geo. A. Nourse, att'y for def't. Filed Feb'ry 5, 1875; Wm. Harvey, clerk; W. M. Ledlie, deputy clerk. In U. S. Circuit Court, Dist. of Cal.; filed Dec. 13, 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep'y clerk.

In the District Court of the Twelfth Judicial District of the
25 State of California, in and for the City and County of San Francisco.

DANIEL W. GILLETT, Plaintiff,
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY, Defendant.

Demurrer.
No. 18,167.

Demurrer.

Now comes the defendant, the Keystone Consolidated Mining

Company, and demurs to the last amended complaint herein, and for cause of demurrer avers:

I.

That several causes of action have been improperly united and have not been separately stated, to wit, a cause of action to recover the possession of the real property mentioned and described in said last amended complaint, and a cause of action for trespass and
26 damages, as alleged in said last amended complaint.

II.

That said last amended complaint does not state facts sufficient to constitute a cause of action.

III.

That said last amended complaint is ambiguous, unintelligible, and uncertain.

Wherefore defendant prays to be hence dismissed with its costs.

GEO. A. NOURSE,
Attorney for Defendant.

S. M. WILSON, *of Counsel.*

(Endorsed:) Personal service of the within is admitted, at San Francisco, this 15th day of February, 1875; Wm. H. Patterson, attorney for plaintiff; filed February 15, A. D. 1875; Wm. Harvey, clerk; by J. D. Ruggles, dep. clerk. In U. S. Circuit Court, Dist. of Cal.; filed December 13, 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep'y cl'k.

In the District Court of the Twelfth Judicial District of the
27 State of California, in and for the City and County of San Francisco.

January Term.—Friday, March 26th, 1875.

Present: Hon. J. R. Sharpstein, judge.

DANIEL W. GILLETT, Plaintiff,
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY, Defendant.

Order that Demurrer be Overruled.

In this action it is now ordered by the court that the demurrer to the amended complaint heretofore submitted be, and the same is, overruled, with leave to defendant to answer within ten days.
28 In the U. S. Circuit Court, Dist. of Cala. Filed Dec. 13th, 1875.

(Signed) L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dep. Clk.*

29 12th District Court, City and County of San Francisco.

D. W. GILLETT
vs.
THE KEYSTONE CONSOLIDATED MINING CO. *et al.*

Notice of Overruling of Demurrer.

To GEO. A. NOURSE, Esq., *Atty. for Defts.*

Please take notice that the demurrer heretofore interposed by the defendants in the above-entitled action to the amended complaint of the plaintiff therein was on the 26th day of March, 1875, overruled by the above-entitled court.

Dated June 2d, 1875.

Yours, &c., WM. H. PATTERSON,
Atty. for Plff.

30 (Endorsed:) Service of within is hereby admitted this 2d day of June, A. D. 1875; Geo. A. Nourse, atty. for defts; filed June 2d, 1875; Wm. Harvey, clerk, by J. D. Ruggles; in U. S. Circuit Court, Dist. of Cala.; filed Dec'r 13th, 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, depy. clk.

In the District Court of the Twelfth Judicial District of the
31 State of California, in and for the City and County of San Francisco.

DANIEL W. GILLETT, Plaintiff,
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY, Defendant.

Answer.

And now comes the Keystone Consolidated Mining Company, a corporation, defendant in above-entitled action, by Nourse & Phelps, its attorneys, and, for answer to the amended complaint of the plaintiff therein, denies that the plaintiff in said action is or was on the 23d day of March, A. D. 1872, or at the date of the commencement of said action, or ever, the owner in fee-simple or otherwise, or entitled to the possession of the tract of land in said amended
32 complaint described, or of any part thereof.

And denies that on the 27th day of March, A. D. 1872, or at any time, this defendant ousted or ejected said plaintiff from the possession of said tract of land or of any portion thereof.

And denies that it, the said defendant, does, or did at the commencement of this action, or ever, detain or withhold from said plaintiff the possession of or have possession of any portion of the said tract of land in said amended complaint described, except those parcels thereof severally and respectively bounded and described as follows, to wit:

1. A certain mine and mining ground commonly known as the Geneva and Spring Hill Mining Claims, bounded as follows: Beginning at a post marked "41 and 42" on a point of rocks on south bank of Amador Creek; thence south twenty (20) degrees thirty-eight (38) minutes east thirty-one (31) chains and twenty-
33 three (23) links to post marked "42"; thence south fifty-six (56) degrees sixteen (16) minutes west three (3) chains and sixty-seven (67) links to post marked "42" on supposed center of vein, from which the southeast corner of section thirty-six (36), in township seven (7) north, of range ten (10) east, Mount Diablo meridian, bears south twenty (20) degrees fifty-nine (59) minutes east at the distance of twenty-seven (27) chains and sixty (60) links, four (4) chains and eighty-eight (88) links to post marked "42"; thence north forty-one (41) degrees thirty-one (31) minutes west ten (10) chains and seventy-five (75) links to post marked "42 and 45"; thence north twenty-nine (29) degrees two (2) minutes west two (2) chains and seventy-seven (77) links to post marked "42 and 45"; thence north nineteen (19) degrees thirty (30) minutes west six (6) chains and sixty-two (62) links to post marked "42 and 45";
34 thence north thirteen (13) degrees twenty-six (26) minutes west seven (7) chains and forty-three (43) links to post marked "42 and 45"; thence north sixteen (16) degrees two (2) minutes west four (4) chains and eight (8) links to post marked "41 and 42"; thence north fifty-seven (57) degrees fifty-eight (58) minutes east with magnetic variation at sixteen (16) degrees thirty (30) minutes east seven (7) chains and seventy-seven (77) links to the place of beginning; containing twenty-four (24) acres and seventy hundredths ($\frac{70}{100}$) of an acre of land, more or less, being the same tract or parcel of mining ground known as the Geneva and Spring Hill Mining Claims, designated by the U. S. Surveyor-General as lot No. 40 in the township mentioned in said amended complaint, conveyed to this defendant by the United States of America by its patent No. 587, issued to the defendant as patentee, and bearing date the
35 seventh day of July, A. D. 1873.

2. A certain other mine and mining ground, commonly known as the Keystone Mining Claim, bounded as follows, to wit: Beginning at a post marked "45," thence south sixty-five (65) degrees thirty-four (34) minutes west two (2) chains and sixty-two (62) links to marble monument on northern end of vein, four (4) chains and eighty-seven (87) links to east side of stage road, five (5) chains and ninety-five (95) links to west side of stage road, six (6) chains and seventy-six (76) links to post marked "45" on west side of French Gulch and on the south side of Tone road; thence south fifty-seven (57) degrees fifty-three (53) minutes west three (3) chains and seventeen (17) links to post marked "45"; thence south eighty-two (82) degrees forty-nine (49) minutes west along south side of Tone road, two (2) chains and sixty-five (65) links to post
36 marked "45"; thence south thirty-seven (37) degrees fifty-

two (52) minutes west one (1) chain and thirty-nine (39) links to post marked "45," at corner of vineyard; thence south forty-five (45) degrees fifty-three (53) minutes east seventeen (17) chains and nine (9) links to post marked "45"; thence south forty (40) degrees forty-five (45) minutes east thirty (30) chains and forty-four (44) links to post marked "45"; thence north fifty (50) degrees twenty-three (23) minutes east four (4) chains and forty-nine (49) links to post on center of vein and in center of French Gulch, from which the southeast corner of section thirty-six (36), in township seven (7) north, of range ten (10) east, Mount Diablo meridian, bears south at the distance of eleven (11) chains and five (5) links, four (4) chains and sixty-five (65) links to Sutter and Amador stage road, five (5)
37 chains and seventy (70) links to post marked "45"; thence north forty-one (41) degrees thirty-one (31) minutes west, seventeen (17) chains and eighty-one (81) links to post marked "42," being also the southwesterly corner of Spring Hill and Geneva Mine, twenty-eight (28) chains and fifty-six (56) links to post marked "42" and "45"; thence north twenty-nine (29) degrees two (2) minutes west two (2) chains and seventy-seven (77) links; thence north nineteen (19) degrees thirty (30) minutes west six (6) chains and sixty-two (62) links; thence north thirteen (13) degrees twenty-six (26) minutes west seven (7) chains and forty-three (43) links to the place of beginning; containing thirty-one acres and thirty-one hundredths ($\frac{31}{100}$) of an acre of land, more or less.

3. A certain enclosed field, containing about twenty acres, commonly called and known as the "Keystone Field," the same constituting a portion of the S.W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of
38 the S. E. $\frac{1}{4}$, and of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section thirty-six in said amended complaint mentioned.

Said defendant, further answering, says that it (the said defendant) has never dug out or removed from, or from beneath the surface of any part, parcel, or portion of said tract of land, except the two parcels of mining ground hereinbefore first described, any gold-bearing quartz, or any gold minerals whatever.

II.

And for a further and separate defense, this defendant says that the alleged cause and causes of action in said amended complaint set forth are barred by the provisions of sections 9, 315, and 316 of the Code of Civil Procedure of the State of California.

III.

And for a further defense, and by way of set-off against the
39 damages claimed in said amended complaint by said plaintiff from this defendant, said defendant says that it holds the three parcels of land hereinbefore described, being severally portions of the land described in said amended complaint, and has for more than five years last past held the same in good faith, under color

of title, adversely to the claim of the plaintiff aforesaid, to wit, said mines and mining ground, under and by virtue of their location and possession by defendant and its grantors during a period of many years prior to the 23d day of March, A. D. 1872, in said amended complaint mentioned, and after said date to the issuance of United States patents therefor, and since their said issuance, to wit, the seventh day of July, A. D. 1873, under said patents, and said "Keystone Field" under and by virtue of its possession by said defendant and its grantors for a period of more than fifteen years next
40 preceding the commencement of this action.

And said defendant further says that it has made on said mines and mining ground hereinbefore described permanent improvements, consisting of mills, reduction and assay works, hoisting works, shafts, tunnels, inclines and drifts of great value, to wit, of the value of more than three hundred thousand dollars, which said amount of more than three hundred thousand dollars being so the value of said improvements, or so much thereof as may be necessary, this defendant asks to have allowed as a set-off against any damages which may be allowed plaintiff in this action.

Wherefore defendant prays to be hence dismissed, with his costs in this behalf incurred.

NOURSE & PHELPS,
Attorneys for Defendant.

41 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

James M. McDonald, of said city and county, being duly sworn, says: That he is the president of the Keystone Consolidated Mining Company, defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

J. M. McDONALD.

Subscribed and sworn to before me this 24th day of June, A. D. 1875.

HENRY C. BLAKE,
[SEAL.] *Notary Public.*

42 (Endorsed:) Personal service of the within is admitted, at San Francisco, this 25th day of June, 1875; Wm. H. Patterson, attorney for plaintiff; filed June 25, A. D. 1875; Wm. Harvey, clerk; by J. D. Ruggles, dep. clerk. In U. S. Circuit Court, Dist. of Cal.; filed December 13, 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep. cl'k.

43 In the District Court of the Twelfth Judicial District of the State of California, in and for the City and County of San Francisco.

DANIEL W. GILLETT, Plaintiff,
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY, Defendant.

Petition for Removal of Action to U. S. Circuit Court, Dist. of Cal.

To the District Court of the Twelfth Judicial District of the State of California, within and for the city and county of San Francisco:

Your petitioner, the Keystone Consolidated Mining Company, in this its petition for the removal of the above-entitled action to the United States Circuit Court for the Ninth Judicial Circuit,
44 District of California, humbly showeth, that it, the said petitioner, is a corporation incorporated under under the laws of the State of California, and defendant in the above-entitled action, and that the plaintiff in said action is a citizen of the State of New York; that the controversy in said action is between citizens of different States; that the matter in dispute therein exceeds five hundred dollars, in that the value of the land in controversy therein exceeds five hundred dollars, and in that the plaintiff claims damages therein in the sum of two hundred and eighty-eight thousand dollars; and that said action arises under the laws of the United States.

Wherefore your petitioner prays that said action may be removed to said United States Circuit Court for the Ninth Judicial Circuit, District of California.

[SEAL.] GEO. A. NOURSE.
THE KEYSTONE CONSOLIDATED MINING CO.
By ERWIN J. CRANE, *Vice Pres.*,
45 *Attorney for Petitioner and Defendant.*
S. M. WILSON, *of Counsel.*

STATE OF CALIFORNIA. } ss:
City and County of San Francisco. }

Erwin J. Crane, of said city and county, being duly sworn, says: That he is the vice-president of the Keystone Consolidated Mining Company, a corporation incorporated under the laws of the State of California, petitioner and defendant above named; that he has read the foregoing petition; that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

ERWIN J. CRANE.

Subscribed and sworn to before me this 22d day of July, A. D. 1875.

JAMES L. KING,
[SEAL.] *Notary Public.*

46 (Endorsed:) Filed July 22d, A. D. 1875; William Harvey, clerk; by J. D. Ruggles, dep. clerk. In U. S. Circuit Court, filed Dec. 13, 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep. clk.

47 In the District Court of the Twelfth Judicial District of the State of California, in and for the City and County of San Francisco.

DANIEL W. GILLETT, Plaintiff,
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY, Defendant.

Notice of Motion to Remove Action to U. S. Circuit Court.

SIR: Please take notice that on Friday, the thirtieth day of July, instant, at the opening of court on that day, or as soon thereafter as counsel can be heard, a motion will be made before the court above named, in the above-entitled action, on the part of the defendant therein, to remove said action to the United States Circuit Court for the Ninth Judicial Circuit, District of California, on the ground that said action is of a civil nature at common law; that the mat-
48 ter in dispute exceeds five hundred dollars; that the controversy in said action is between citizens of different States; and on the further ground that said controversy and action arise under the laws of the United States.

You will further please take notice that the petition of said defendant for such removal, and the bond of said defendant, with two sureties, now on file in said action, together with the records and files in said action, will be referred to and read in support of said motion.

GEO. A. NOURSE, *Attorney for Def't.*
S. M. WILSON, *of Counsel.*

To W. H. PATTERSON, ESQR., *Attorney for Plaintiff.*

49 (Endorsed:) Personal service of the within is admitted, at San Francisco, this 22d day of July, 1875; Wm. H. Patterson, attorney for plaintiff; filed July 22d, A. D. 1875; Wm. Harvey, clerk; by J. D. Ruggles, dep. clerk. In U. S. Circuit Court, Dist. of California; filed Dec. 13, 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep. clk.

50 In the District Court of the Twelfth Judicial District of the State of California, in and for the City and County of San Francisco.

DANIEL W. GILLETT, Plaintiff,
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY, Defendant.

Bond on removal of action to U. S. Circuit Court.

Bond on Removal to U. S. Circuit Court.

Know all men by these presents, that we, Erwin J. Crane and

Milton S. Latham, are held and firmly bound unto Daniel W. Gillett, the plaintiff in the above-entitled action, in the sum of one thousand dollars, good and lawful money of the United States, to be paid to said Daniel W. Gillett, his heirs, executors, administrators, and assigns, if default be made in the condition following; to which payment well and truly to be made we do bind ourselves, our heirs,
51 executors, and administrators, and each of them firmly by these presents.

Sealed with our seals. Dated this 22d day of July, A. D. 1875.

The condition of the above written obligation is such, that whereas the defendant in above-entitled action, a corporation incorporated under the laws of the State of California, has applied to remove said action to the United States Circuit Court within and for the Ninth Judicial Circuit, District of California:

Now, therefore, if upon the granting of said application the above bound corporation, defendant as aforesaid, shall enter in said United States Circuit Court on the first day of its next session a copy of the record in said suit, and shall pay all costs that may be awarded by said Circuit Court if said court shall hold that said suit was wrongfully or improperly removed thereto, then and in such case this obligation shall be void; otherwise to be and remain in full
52 force and virtue.

ERWIN J. CRANE. [SEAL.]
MILTON S. LATHAM. [SEAL.]

STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

Erwin J. Crane and Milton S. Latham, being duly sworn, severally say, each for himself, that he is one of the persons named in and who executed the foregoing obligation; that he is a citizen and resident of the State of California, and a freeholder therein; and that he is worth double the sum specified in said obligation over and above all his just debts and liabilities, exclusive of property exempt by law from seizure on execution.

MILTON S. LATHAM.
ERWIN J. CRANE.

Subscribed and sworn to before me this 22d day of July, A. D. 1875.
JAMES L. KING,
[SEAL] *Notary Public.*

53 (Endorsed:) Filed July 22d, A. D. 1875; Wm. Harvey, clerk; by J. D. Ruggles, dep. clk.; in U. S. Circuit Court, Dist. of Cal.; filed December 13th, 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, depy. clk.

54 In the District Court of the 12th Judicial District of the State of California, in and for the City and County of San Francisco.

DANIEL W. GILLETT, Plaintiff, *vs.* KEYSTONE C. MINING CO., Defendant. } No. 18,167. Copy of order transferring cause.

Order transferring cause to U. S. Circuit Court, Dist. of Cal.

This action came on to be heard at the July term of this court, A. D. 1875, to wit, on the 30th day of July in said year, on the motion made in behalf of defendant to remove said action into the United States Circuit Court for the 9th Judicial District of California, Geo. A. Nourse, attorney for said defendant, and S. M. Wilson, Esq., of counsel, appearing in support of said motion, and W. H. Patterson, Esq., attorney for plaintiff, appearing in opposition thereto; and upon reading the affidavit of ——— and the pleadings
55 in said action, it appearing that the matter in dispute in said action exceeds exclusive of costs the sum of five hundred dollars, that said action arises under the laws of the United States, and that there is in said action a controversy between citizens of different States, in that the plaintiff in said action is a citizen of the State of New York, and the defendant therein is a citizen of the State of California; and it further appearing that the bond required in such case by the statute of the United States in such case made and provided has been duly filed on the part of said defendant in this court, it is ordered that said action be, and the same is hereby, removed to said United States Circuit Court for the Ninth Judicial Circuit, District of California.

I hereby certify the foregoing to be a full, true, and correct
56 copy of an order entered on the minutes of said Twelfth District Court in the above-entitled cause.

Attest my hand and the seal of said District Court this twenty-
[SEAL.] ninth day of November, 1875.

WILLIAM HARVEY, *Clerk.*
By J. D. RUGGLES, *Deputy Clerk.*

(Endorsed:) In the U. S. Circuit Court, Dist. of Cal.; filed Dec. 13, 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep. cl'k.

57 In the District Court of the Twelfth Judicial District of the State of California, in and for the City and County of San Francisco.

DANIEL W. GILLETT *vs.* THE KEYSTONE CONSOLIDATED MINING COMPANY. } No. 18,167.

Certificate of County Clerk to the Copy of the Record.

I, William Harvey, county clerk of the city and county of San

Francisco and *ex-officio* clerk of the District Court of the Twelfth Judicial District of the State of California, in and for the said city and county, do hereby certify the foregoing to be full, true, and correct copies of the original papers and orders therein made, and entered on file and of record in my office in the above-entitled cause, and of the whole thereof.

58 In witness whereof, I have hereunto set my hand and affixed the seal of said court this 29th day of November, A. D. [SEAL.] 1875. WILLIAM HARVEY, *Clerk.*
By J. D. RUGGLES, *Deputy Cl'k.*

(Endorsed:) In the U. S. Circuit Court, Dist. of Cal.; filed 13 Dec'r, 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep'y cl'k. Transferred papers; filed Dec'r 13, 1875; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep. cl'k.

59 In the Circuit Court of the United States within and for the Ninth Judicial Circuit, District of California.

DANIEL W. GILLETT, Plaintiff,
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY, Defendant.

Findings.

This cause came on to be heard in the above-named court, at the February Term thereof, A. D. 1878, to wit, on the fourth day of said month, before Hon. Lorenzo Sawyer, judge of said court, without a jury,—both parties having expressly waived a trial by a jury in the mode prescribed by law, plaintiff appearing by his counsel, A. E. Adams and H. H. Haight, and defendant appearing by George A. Nourse, its attorney, and S. M. Wilson, its counsel.

The facts in the case are agreed upon by stipulations on file,
60 and the case having been argued in printed briefs in behalf of said plaintiff and defendant respectively, said judge of said court now files his findings of fact in said action, in the language of said stipulations on file, as follows, to wit:

I.

1. The annexed plat, marked "Exhibit A," is substantially a correct plat of section 36, in township 7 north, of range 10 east, Mount Diablo meridian, being made by Richard H. Stretch, civil and mining engineer, from an actual survey made by him in the fall or winter of 1870.

2. The east half of said section is the land described in the complaint.

3. The mining claim or premises described in the United States patent (General Land Office number 587) issued to the de-
61 fendant, the Keystone Consolidated Mining Company, as patentee, said patent being date July 7, 1873, is the most

northerly and easterly of the two tracts represented on said plat included in green shaded lines, and marked "Keystone Consold— Co.," being the mining claims commonly known as the "Spring Hill" and "Geneva."

4. The other (being the most southerly and westerly) of said two tracts included in the green shaded lines, is the mining claim and premises described in the U. S. patent (General Land Office No. 593) dated July 14, 1873, issued to said defendant as patentee, and is commonly known as the "Keystone Mining Claim."

5. Said "Spring Hill" mining claim was located in May, 1851; said "Geneva" mining claim, October 12, 1863, and said "Keystone" mining claim in 1853,—all said locations being made in accordance with the then existing rules of the mining district and the customs of miners.

62 6. The original locators of each of said claims and their grantees have held undisturbed possession thereof from the date of such location until the present time, and the possessory title to each said claim acquired by said locations respectively, and by such possession and the working of said mines, was vested in defendant at the time of its application for patents for said mines being filed in the U. S. Land Office at Sacramento, unless it shall be held that the State of California acquired title to said section 36 by grant from the United States.

7. The applications on which said patents issued and therein referred to, were filed in the U. S. Land Office at Sacramento on the 6th day of January, 1871.

8. United States patents have issued for the mining claims delineated on the official plat of said township, known severally as the "Original Amador," "Bunker Hill," "Last Chance," "Ne-
63 vada," "Eclipse," and "El Dorado," quartz mines, and so marked on said plat.

9. All the mining claims hereinbefore mentioned are situated on the "Mother Lode," commonly so called, a broad mineral belt, containing gold-bearing quartz, running northwesterly and southeasterly across said east half of said section, and extending many miles beyond in each direction.

10. The east half of said section 36 is very valuable for mining purposes, and almost worthless for agricultural purposes.

II.

1. The photograph hereto annexed, marked "Exhibit B," is a correct photographic view of the town commonly called "Amador City," (in which town are the buildings represented on the plat "Exhibit A," hereinbefore mentioned,) taken by W. Muybridge, photographed in the spring of 1871, from the hill just back of the "Spring-Hill" works, so called.

64 2. The photograph hereto annexed, marked "Exhibit C," is a photographic view of the town from a point marked "A"

in "Exhibit A," on the hill on which is situated the "Original Amador" mine, so called; the building in the foreground nearest the right hand lower corner of the photograph being that marked "school-house" on the plat "Exhibit A."

III.

The town of "Amador City," shown by the photographic views hereto attached, is situated as represented on said "Exhibit A," and was first settled in 1850 by a few placer miners. In 1851, the quartz-mining locations were made in said town of the "Spring Hill," "Original Amador," "Rancherie," (now Bunker Hill,) "Granite State," and "Pleasant Ridge," (now known as the Keystone,) and quartz mills were built and put into operation.

This brought an accession to the population of the town, and before the close of 1851 it had about 175 to 200 people. In
65 1853 it had still more, and by 1858 its population reached 400 to 500, from which it has not since differed materially, women and children becoming more numerous and men rather less so. It is a mining town exclusively, being entirely supported by the business of the mines in and about it.

IV.

June 18, 1870, one Henry Casey filed in the office of the State Surveyor-General at Sacramento his application to purchase the east half of section 36 aforesaid, being the land described in the complaint.

October 21, 1870, a certificate of purchase of said land was issued to said Casey by the Register of the State Land Office.

October 3, 1872, a State patent was issued to plaintiff, the grantee of said Casey, although a protest of defendant against its issuance was then on file in the State Land Office.

Within three months after the filing of said plat in said U. S. Land Office, the applications of defendant for U. S. patents for the
66 "Spring Hill" and "Geneva" and the "Keystone" mining claims aforesaid, and of other parties for patents of said Bunker Hill, "Original Amador," and "Eclipse" mining claims, were filed in said U. S. Land Office.

November 28, 1870, the application of the then county judge of Amador county (in which said town of Amador City was then and is now situated) to enter under the U. S. town-site land of March 2, 1867, (in trust for the inhabitants the town of Amador,) the northeast quarter, the east half of the northwest quarter, the northwest quarter of the southeast quarter and the northeast quarter of the southwest quarter of said section 36, was filed in the U. S. Land Office at Sacramento.

All these applications were contested before the Register and Receiver of said Land Office, Commissioner of the General Land Office, and before the Secretary of the Interior, by the State of Cali-

67 fornia, represented by counsel employed by the parties really interested in the Casey certificate of purchase and the State patent to Gillett hereinbefore mentioned.

The decisions of all these officers were adverse to the State. U. S. patents were issued upon said decisions in due routine of official business for said mining claims and for the town site.

The patent for said town site embraced lots numbered 3, 4, 5, 6, and 8; the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of said section 36. This description is according to a supplemental plat of said section, made by direction of the U. S. Surveyor-General for California, after platting said mining claim, and embraces all of the land originally applied for as said town site (except N. ½ of N. E. ¼ of said section) not included in mining patents issued by the United States.

68 The tract delineated in "Exhibit A," marked "Keystone Field," containing about 38 to 40 acres, has been, ever since 1864, cultivated by the owners of the Keystone mine as a hay ranch, grain being sown yearly thereon and cut before ripe for hay. About three-fourths of said field has so been cultivated.

Township 7 north, in range 10 east, Mount Diablo meridian, in which the demanded premises are situated, was, by and under the authority of the United States, surveyed in the field in March, 1870. The official plat of said survey was approved by the U. S. Surveyor-General for the State of California September 3, 1870, and the township plat filed in the U. S. Land Office at Sacramento for the district of lands wherein said township plat was located October 7, 1870, and not sooner.

Many of the buildings shown in the photograph marked "Exhibit B," hereinbefore mentioned, are dwelling houses, and were
69 standing and occupied as such dwelling houses prior to the said government survey of said township. It is further stipulated that the buildings shown in said photograph "Exhibit B" are on the east half of said section 36 in said complaint described, except those whose location is marked on the plat marked "Exhibit A," part of said stipulation, in small black parallelograms, as being outside of said half section.

Conclusions of Law.

From the foregoing facts found as aforesaid, I hold as conclusions of law that no title to the demanded premises ever vested in the State of California, and that by the U. S. patents issued to the defendant, the title in fee-simple absolute to the land described therein passed to and vested in said defendant.

70 Let judgment be entered in favor of the defendant and against the plaintiff, in accordance with the foregoing, with costs. (Signed) LORENZO SAWYER,

Circuit Judge.

74 (Endorsed:) Filed 18 June, 1878; L. S. B. Sawyer, clerk; by J. F. O'Beirne, depy. clk.

75 In the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the District of California.

D. W. GILLETT
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY. } No. 1454.

Judgment.

This cause having come on regularly for trial on the 7th day of February, A. D. 1878, being a day in the February, A. D. 1878, term of said court, before the court sitting without a jury, a trial by jury having been expressly waived by written stipulation of counsel for the respective parties herein, duly filed with the clerk of said court, H. H. Hayht and J. C. Adams, Esqs., appearing on behalf of the plaintiff, and George A. Nourse and S. M. Wilson, Esqs., on behalf of defendant, and the evidence on behalf of the respective
76 parties herein having been introduced and closed, and the cause after arguments of counsel having been submitted to the court for consideration and decision, and the court after due deliberation having filed its finding in writing and ordered that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and the finding aforesaid, it is considered by the court that the plaintiff take nothing by this action; that the defendant go hereof without day; and that the said defendant recover from the said plaintiff its costs in this behalf expended, taxed at ———.

Judgment entered the 18th day of June, A. D. 1878.

L. S. B. SAWYER, *Clerk.*

77 I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause.

Attest my hand and the seal of said Circuit Court this 18th
[SEAL.] day of June, A. D. 1878.

L. S. B. SAWYER, *Clerk.*

78 In the Circuit Court of the United States, Ninth Judicial Circuit, District of California.

DANIEL W. GILLETT
vs.
THE KEYSTONE CONSOLIDATED MINING CO. }

Certificate to Judgment Roll.

I, Lorenzo S. B. Sawyer, clerk of the Circuit Court of the United States of the Ninth Judicial Circuit within and for the District of

California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the therein-entitled action.

Witness my hand and the seal of said Circuit Court this 18th day of June, A. D. 1878.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

79 (Endorsed:) Judgment roll; filed 18th June, 1878; L. S. B. Sawyer, clerk; by J. F. O'Beirne, depy. clerk.

80 At a stated term of the Circuit Court of the United States of America for the District of California, held at the court room in the City and County of San Francisco on Monday, the eighth day of September, in the year of our Lord one thousand eight hundred and seventy-nine—

Present: The Honorable Lorenzo Sawyer, circuit judge.

DANIEL W. GILLETT
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY.

Order substituting Ivanhoe Mining Company as Plaintiff.

On motion of Messrs. Stewart, Vanclief, and Herrin, attorneys for the Ivanhoe Mining Company in this action, it being made to appear to this court, by the affidavit of H. C. Newhall, on file in this cause, that, since the rendition and entry of the judgment in
81 this action, D. W. Gillett, the plaintiff herein, died intestate in the State of New York, being at the time of his death a resident and citizen of said State of New York; that said intestate left surviving him, as his only heirs, his wife and one son, the issue of his marriage with his said wife, which son at the time of the death of said intestate was over twenty-one years of age; that said heirs were at said time, and since have been, residents and citizens of said State of New York; that since the death of said plaintiff the Ivanhoe Mining Company, a corporation organized and existing under the laws of the State of California, has, by conveyance from said heirs, succeeded to and acquired, and is now the owner of all the right, title, and interest which said plaintiff had at and before the time of his death in and to the land described in the complaint, the subject-matter of this action:

82 It is ordered that said Ivanhoe Mining Company be, and it is hereby, substituted as the plaintiff in this action in the place and stead of said D. W. Gillett, deceased, with leave to prosecute a writ of error from the judgmeat heretofore rendered and entered in this action.

83 In the Supreme Court of the United States of America.

IVANHOE MINING COMPANY, Plaintiff in Error,
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY, Defendant in Error.

Bond.

Know all men by these presents, that we, Wm. B. Carr and F. K. Bechtel, both of the State of California, are held and firmly bound unto The Keystone Consolidated Mining Company, defendant in error, in the sum of five hundred dollars, lawful money of the United States of America:

To the payment of which well and truly to be made we bind ourselves and each of us, and our heirs, executors, and administrators firmly by these presents.

Sealed with our seals. Dated the ninth day of September, A. D. 1879. Whereas the above-named The Ivanhoe Mining Com-
84 pany has prosecuted a writ of error to the Supreme Court of the United States of America to reverse the judgment rendered by the Circuit Court of the United States of America for the District of California, in the cause entitled Daniel W. Gillett versus The Keystone Consolidated Mining Company, and numbered 1454 in said Circuit Court:

Now, therefore, the condition of this obligation is such, that if the above-named Ivanhoe Mining Company, plaintiff in error, shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

W. B. CARR.
F. K. BECHTEL.

85 UNITED STATES OF AMERICA, *District of California*, } *ss:*

Wm. B. Carr and F. K. Bechtel, being duly sworn, each for himself deposes and says that he is a freeholder in said district, and is worth the sum of five hundred dollars in lawful money of the United States of America, exclusive of property exempt from execution and over and above all his just debts and liabilities.

W. B. CARR.
F. K. BECHTEL.

Subscribed and sworn to before me this 9th day of September, A. D. 1879. HOLLAND SMITH,
[SEAL.] *Notary Public.*

86 (Endorsed:) I approve the form of the within bond and the sufficiency of the sureties therein. Dated Sept. 9, 1879. Signed, Lorenzo Sawyer, U. S. circuit judge ninth judicial circuit. Filed September 9th, 1879; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep'y cl'k.

87 Supreme Court of the United States.

IVANHOE MINING COMPANY, Plaintiff in Error,
vs.
THE KEYSTONE MINING COMPANY, Defendant in Error.

Assignment of Errors.

Error to the Circuit Court of the United States for the Ninth Circuit, District of California.

Now at this time comes the said plaintiff in error, by Wm. M. Stewart, its attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit: That the said Circuit Court found and adjudged as conclusions of law from the facts found, "that no title to the demanded premises
88 ever vested in the State of California," and that "by the United States patent issued to the defendant the title in fee-simple absolute to the land described therein passed to and was vested in the defendant." And in this, to wit: That upon the facts found the court gave judgment for the defendant, whereas upon said facts the judgment of the court should have been in favor of the plaintiff for the demanded premises and for costs.

WM. M. STEWART,
Attorney for Plaintiff in Error.

(Endorsed:) Filed Septr. 29th, 1879; L. S. B. Sawyer, clerk; by J. F. O'Beirne, dep'y clk.

I, Lorenzo S. B. Sawyer, clerk of the Circuit Court of the United States of the Ninth Judicial Circuit in and for the District of California, do hereby certify that the foregoing eighty-eight written pages, numbered from 1 to 88 inclusive, are a full, true, and correct copy of the record and of all proceedings in the therein-entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and seal of said Circuit Court this 9th day
[SEAL.] of October, A. D. 1879.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

OFFICE SUPREME COURT U.S.
FILED
OCT 5 1880
JAMES H. McKENNEY, Clerk

BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

No. 986.

THE IVANHOE MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE KEYSTONE CONSOLIDATED MINING COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Supreme Court of the United States.

No. 986.

THE IVANHOE MINING COMPANY,
Plaintiff in Error,
vs.
THE KEYSTONE CONSOLIDATED MINING COMPANY.

In Error to the Circuit Court of the United States for the District of California.

This was a suit in the nature of an action of ejectment brought in a State Court of California by Daniel W. Gillett, to recover from the defendant in error the possession of the east half of section thirty-six, township seven north, range ten east, Mount Diablo meridian, in the State of California. (See Complaint, p. 8, of Transcript.)

The action was removed to the Circuit Court of the United States on the petition of defendant, p. 15.

The Court gave judgment for defendant on the 18th day of June, 1878, p. 23.

After the entry of said judgment the plaintiff—Gillett—died intestate at his residence in the State of New York, leaving him surviving his wife, and one son over twenty-one years of age—his only heirs at law—and residents of the State of New York.

After the death of said Gillett, and prior to the 8th day of September, 1879, said heirs conveyed the demanded premises to the plaintiff in error, which was substituted for the original plaintiff by order of said Circuit Court on the 8th day of September, 1879, p. 24.

On the trial the plaintiff claimed title to the demanded premises through a grant of the United States to the State of California for the purposes of public schools, by Act of Congress approved March 3d, 1853, (10 Stat. at Large, 244,) and a patent from the State of California, issued Oct. 3d, 1872.

The defendant claimed title to portions of the demanded premises by patents from the United States, issued in July, 1873, in pursuance of the Act of Congress of July 26th, 1866, and July 9th, 1870, providing, among other things, for a sale of the "mineral lands of the *public domain.*"

That these portions of said premises so patented to the defendant by the United States, are mineral lands was not disputed, and was found as a fact by the Court.

Township seven of range ten east, in which the demanded premises are situated, was surveyed in the field by authority of the United States in March, 1870. The official plat of said survey was approved by the United States Surveyor General for the State of California, September 3d, 1870, and was filed in the appropriate U. S. Land Office at Sacramento City on the 7th day of October, 1870.

The applications on which said patents were issued by the United States to the defendant, were first made and filed in the U. S. Land Office at Sacramento City on the 6th day of January, 1871.

That portion of the land patented to the defendant, described as the "Spring Hill" mining claim, was located as a mining claim in May, 1851; that portion described as the "Keystone" mining claim is found by the Court to have been located in 1853, but what time in 1853 is not expressed; and that portion described as the "Geneva" mining claim was located on the 12th day of October, 1863.

The sixth finding of fact by the Court is, that "the "original locators of each of said claims, and their "grantees, have held undisturbed possession thereof "from the date of such location until the present "time, and the possessory title to each said claim ac- "quired by said locations respectively, and by such "possession and working of said mines, was vested in "defendant at the time of its application for patents

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" for said mines being filed in the U. S. Land Office at " Sacramento, unless it shall be held that the State of " California acquired title to said section 36 by grant " from the United States."

Plaintiff's application to purchase the demanded premises from the State of California, was made June 18th, 1870. A certificate of purchase was issued thereon by the Register of the State Land Office October 21st, 1870, and the State patent was issued to plaintiff October 3d, 1872.

On the 28th day of November, 1870, an application was made for a town site patent for a portion of the demanded premises by the town of Amador City, and subsequently (date not stated) such town site patent issued for a part of the land applied for, but not including any part of the land or mining claims patented to the defendant, or claimed by the defendant, in this action. And it also appears that a field, inclosing some thirty acres of the demanded premises, but no part of the land patented to defendant, had been cultivated for hay by defendant since 1864.

The foregoing are all the facts from which either party claims any legal consequence, and upon those facts the Circuit Court found as conclusions of law, " that no title to the demanded premises ever vested " in the State of California, and that by the United " States patents issued to the defendant, the title in fee

"simple absolute to the land described therein passed "to and vested in said defendant;" fol. 69, and accordingly gave judgment for the defendant.

The plaintiff now assigns as error both these conclusions of law and the judgment for defendant, and contends that upon the facts found by the Court, the judgment should have been for the plaintiff.

We propose to discuss the principal points of law arising upon the facts found, in the following order:

1st. The nature and effect of the general grant of sections 16 and 36 to the State of California by the Act of Congress approved March 3d, 1853, independently of the exceptions to the grant, and the qualifications thereof, expressed or implied, in the Act.

2d. The exceptions to, and qualifications of the general grant, expressed or implied, in the Act.

3d. The objections to our construction of said Act.

I.

The Act of March 3, 1853, is entitled "An Act to "provide for the survey of the public lands in Cali- "fornia, the granting of pre-emption rights therein, "and for other purposes."

The body of the Act shows that the principal "other purposes," not specified in the title, were to

provide for the sale of the public lands, to grant to the State Sections 16 and 36 for the support of schools, seventy-two sections for a seminary of learning, and ten sections for public buildings, and also to give to the State other lands in lieu of Sections 16 and 36, in all cases where those sections in place were excepted from the grant.

All that directly relates to the grant of school sections will be found in the Sixth and Seventh Sections of the Act, which are as follows :

SEC. 6. And be it further enacted, that all the public lands in the State of California, whether surveyed or unsurveyed, with the exceptions of sections sixteen and thirty-six, which shall be, and hereby are granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting, also, the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the pre-emption laws of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions and limitations therein, except as is herein otherwise provided; and shall, after the plats thereof are returned to the office of the Register, be offered for sale, after six months' public notice in the State of the time and place of sale, under the laws, rules and regulations now governing such sales, or such as may be hereafter prescribed; provided, that where unsurveyed lands are claimed by pre-emption, the usual notice of such claim shall be filed within three months after the return of the plats of surveys to the land offices, and proof and payment shall be made prior to the day appointed by the President's proclamation for the commencement of the sale, including such lands; the entry of such

claims to be made by legal subdivisions, according to the United States survey, and in the most compact form; and provided further, that the fact of persons having heretofore had the benefit of said act of the fourth of September, eighteen hundred and forty-one, shall interpose no bar to their obtaining the benefits of this act; and all of said lands that shall remain unsold after having been proclaimed and offered, shall be subject to entry at private sale as other public land, at the same minimum price per acre; and the register and receiver shall not be entitled to any percentage or fees, except for deciding pre-emption cases, when each of them shall be allowed the same fees as are paid to other like officers; but the receiver shall be entitled to his actual necessary expenses, going and returning, in making his deposits; provided, that nothing in this act shall be construed to authorize any settlement to be made on any public lands not surveyed, unless the same be made within one year from the passage of this act; nor shall any right of such settlers be recognized by virtue of any settlement or improvement made of such unsurveyed lands subsequent to that day; and provided further, that this act shall not be construed to authorize any settlement to be made on any tract of land in the occupation or possession of any Indian tribe, or to grant any pre-emption right to the same.

SEC. 7. And be it further enacted, that where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the Act of Congress approved on the twentieth of May, eighteen hundred and twenty-six, entitled "An Act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for," and which shall be subject to approval by the Secretary of the Interior. And no person shall

make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority; nor shall any person obtain the benefits of this act by a settlement or location on mineral lands.

With a little admissible transposition, the Sixth Section, so far as it relates to the school grant, may be read as follows : "Sections 16 and 36 of all the "public lands in the State of California, whether sur- "veyed or unsurveyed, shall be, and hereby are "granted to the State for the purposes of public "schools in each township."

As to the time when the grant took effect, it should be premised that the State of California, with all the attributes of a political corporation, had been in existence over two years at the date of the grant, and was therefore, fully competent to take the granted lands, at the instant when the Act making the grant was approved by the President; and that the words of the grant are in the present tense—"hereby are granted." Whereas, nearly all the school grants to other States are to be found in Acts enabling such States to form constitutions and to apply for admission to the Union, passed before such States were admitted or organized; and that the words of grant, in nearly all of them, are in the future tense—"there shall be granted." Only four States besides California—namely, Arkansas, Iowa, Florida and Kansas—were admitted on constitutions already formed. Arkansas was admitted with

like grants for schools, as had been the State of Missouri, to which the grant was in the future tense. The grant to Kansas was in the Act of admission, and was in the future tense. The words of the grant to Florida were that "there be granted," and to Iowa that "there shall be granted."

The only grants of school lands, in words of the present tense, besides that to California, are those to Nevada and Colorado.

Attention is called to these contrasts for the purpose of showing how much stronger is the case of the grant to California, than are those to the older States; and yet the latter, in mere words of promise or compact, to grant at a future time, to States to be thereafter organized and admitted into the Union, lands to be thereafter surveyed, have been held to convey an irrevocable interest in lands granted before the survey, and to be completely executed by the survey, without a patent or any further assurance of title from the Government.

1st. Let us examine the leading cases construing legislative acts in the nature of compacts, to grant lands in the future.

The Act of Congress of March 3d, 1803, provided for the survey of public lands "south of the State of "Tennessee," and for the sale thereof, excepting * * "Section No. 16, which shall be *reserved* in each town-"ship for the support of schools within the same."

The Sixth Section of the Act of April 21, 1806, applicable to the same lands, provided that other lands in lieu of said 16 sections, in certain cases, should be located by the Secretary of the Treasury in the same, or adjoining township.

Both these Acts were passed more than ten years before any Act "to enable the people of the western "part of the Mississippi Territory to form a Constitu- "tion and State Government," and were applicable to the territory now forming the State of Mississippi; and it will be seen that they amounted to no more than a reservation from sale by the United States, and did not purport to grant, or even promise to grant in the future, any lands, to any State or other person; and the High Court of Errors and Appeals of Mississippi, in 1859, held that the reservation in said Act of 1803 gave no title to the State, formed fourteen years after its passage.

Hester vs. *Cusler*, 36 Miss., 681.

Yet, in speaking of said Acts of 1803 and 1806, in *Gaines* vs. *Nicholson*, 9 How., 364, the Supreme Court of the United States said: "The State of Mississippi "acquired a right to every 16 section by virtue of "these Acts, on the extinguishment of the Indian "right to occupancy, the title to which, in respect to "the particular sections, became vested, if vested at "all, as soon as the surveys were made, and the sec- "tions designated. No patent was necessary, or is "ever issued for these school sections."

This is cited, not to show that the reservation from sale in the Act of 1803, ever became a binding compact with the State of Mississippi, but only to show that if it had been in such form as to make it a binding compact, it would have been completely executed by the survey of Section Sixteen, without patent or any other act on the part of the Government. This much is decided, on the hypothesis, that the reservation amounted to a binding compact; but whether it was a binding compact or not, was not decided.

Cooper vs. *Roberts*, 18 How., 173, was an action of ejectment for a portion of a Section No. 16, in the State of Michigan, the plaintiffs claiming under a patent from the State, issued in November, 1851; and the defendant under a patent from the United States, issued in 1852, in pursuance of an Act of Congress of March 1, 1847, authorizing the sale of mineral lands in a mode different from that of other lands—it being admitted that the land was mineral land. The land was not surveyed until the Summer of 1847, after the date of the Act authorizing its sale as mineral land. The title of the State depended wholly upon a clause in the Act admitting the State into the Union, as follows: "that every Section No. 16, in every township "of the public lands, * * * and where "such section has been sold or otherwise disposed of, "other land *shall be* granted to the State for the use of "schools." Held by the Court that the plaintiff's title from the State was good.

In speaking of the nature of the school grant to the State, the Court said: "The State of Michigan was admitted to the Union with the unalterable condition "that every Section No. 16, in every township of the "public lands, * * * shall be granted to the "State for the use of schools. We agree that until "the survey of the township and the designation of "the specific section, the right of the State rests in "compact; binding, it is true, the public faith, and "dependent for execution upon the political authorities. Courts of justice have no authority to mark "out and define the land which shall be subject to the "grant; but when the political authorities have performed this duty, the compact has an object upon "which it can attach, and if there is no legal impediment the title of the State becomes a legal title. "The *jus ad rem*, by the performance of the executive "act, becomes a *jus in re*, judicial in its nature, and "under the cognizance and protection of the judicial "authorities, as well as the others;" and cites *Gaines* vs. *Nicholson*.

The Act to enable the people of Wisconsin Territory to form a Constitution and State Government, preparatory to admission to the Union, approved August 6th, 1846, provides "that Section numbered 16, in ev"ery township of the public lands in said State. and, "when such Section has been sold or otherwise dis"posed of, other lands, etc., *shall be* granted to said "State for the use of schools."

The State of Wisconsin was admitted to the Union in May, 1848, without any further legislation by Congress as to the school grant.

The nature and effect of this grant came in question, and was considered by the Supreme Court of the United States in *Beecher* vs. *Wetherby*, 5 Otto, 517.

The plaintiff claimed title to the 16th Section in T. 28, R. 14, in said State, by virtue of patents from the United States, issued in October, 1872, pursuant to an Act of Congress, approved February 6, 1871, authorizing said township to be sold for the benefit of Indians, for whom it had been reserved prior to the date of said enabling Act.

The defendant claimed title by patent from the State of Wisconsin, issued in 1870. The township was sectionized in 1854.

It was contended, among other things, that said enabling Act did not make a present grant, and that it was only an executory agreement, which never took effect, by reason of treaties with Indians, and said sale under the Act of Congress authorizing the sale of the whole township in which said section was situated. In delivering the opinion of the Court, Mr. Justice Field said: "It was therefore an unalterable condition "of the admission (of the State into the Union) ob- "ligatory upon the United States, that Section 16 in "every township of the public lands in the State, "which had not been sold or otherwise disposed of, "should be granted to the State for the use of schools.

"It matters not whether the words of the compact be "considered as merely promissory on the part of the "United States, and constituting only a pledge of a "grant in future, or as operating to transfer the title "to the State upon her acceptance of the propositions, "as soon as the sections could be afterwards identified "by the public surveys. In either case the lands "which might be embraced within those sections were "appropriated to the State. They were withdrawn "from any other disposition, and set apart from the "public domain, so that no subsequent law author- "izing a sale of it could be construed to embrace them, "although they were not specially excepted. All that "afterwards remained for the United States to do with "respect to them, and all that could be legally done "under the compact, was to identify the sections by "appropriate surveys; or, if any further assurance of "title was required, to provide for the execution of "the proper instruments to transfer the naked fee, or "to adopt such further legislation as would accomplish "that result. *They could not be diverted from their ap-* "*propriation to the State.*"

Then, after quoting and approving what we have quoted from *Cooper* vs. *Roberts*, above, the learned Justice proceeds to say (p. 527): "The Act of Con- "gress of February 6, 1871, authorizing a sale of the "township occupied by the Stockbridge and Munsee "tribes must, therefore, be held to apply only to

"those portions which were outside of Section 16. "It will not be supposed that Congress intended to "authorize a sale of land which it had previously dis- "posed of. The appropriation to the State, as already "stated, *set them apart from the mass of public property "which could be subjected to sale by its direction.*" [The italics are ours.]

A Statute of North Carolina enacted "That 25,000 "acres of land *shall be* allotted for, and given to, Major "Nathaniel Greene," and appointed persons to make the allotment, which was afterwards done by a survey of the land.

It was argued in *Rutherford* vs. *Greene's heirs*, 2 Wheat., 196, that the words of this Statute gave nothing. As they were in the future, and not in the present tense, they indicated an intention to give, in the future, but created no present interest.

But the Court held "that the words were words of "absolute donation, not indeed, of any specific lands, "but of 25,000 acres in the territory set apart for the "officers and soldiers. By the allotment and survey "of the land, this general gift became a particular gift "of the 25,000 acres thus allotted and surveyed."

These cases show the construction and effect given by the highest Court in the land, to legislative acts expressing only a compact or promise to grant lands in the future, and containing no words of present grant.

To these, might be added many cases from the Courts of the States. If these legislative promises or com-

pacts dispose of the lands, so as to withdraw them from the public domain before survey, and are self-executing upon the ascertainment of the land to which they relate, by a survey thereof, there should be no doubt in a case of a grant *in presenti*, to a State already organized and admitted to the Union, as in the case of the grant to California.

2d. The following cases relate to, and construe, legislative grants, *in presenti*.

The Act of Congress admitting the State of Missouri to the Union, approved March 6, 1820, enacted "that "four entire sections of land be, and the same *are hereby* "*granted* to said State for the purpose of fixing a seat "of government thereon."

Held by the Supreme Court of the United States, in *Lessieur* vs. *Price*, 12 How. 72, that "it was a present "grant, wanting identity to make it perfect. * * * "The Act of 1820 vested a title in the State of Mis- "souri, of four sections, and the selection made by the "Legislature pursuant to the act of Congress, * * * "gave precision to the title, and attached to it the "land selected." pp. 35 and 36.

It is to be observed that this grant did not even designate the numbers of the sections granted, or of the townships from which they were to be selected. It furnished no means by which the description might be rendered certain except the selection afterwards

to be made by the Legislature; whereas, the school grants designate the numbers of the sections granted, and the townships in which they are situated—namely: every township on the public lands.

This furnishes all the data necessary to render certain the description and identity of the lands granted, provided only, that the base and meridian lines of the public surveys are given; and certainly so, after the township lines are surveyed. By a survey of the township lines, two side lines of Section 36 are actually surveyed, and the other two, and all the boundary lines of Section 16, may be exactly located by any ordinary surveyor, from the township lines, and the law prescribing the mode of sectionizing. *Blunt's Leesee* vs. *Smith*, 7 Wheat., 278.

An Act of Congress, approved June 3, 1856, granting public lands to the State of Wisconsin to aid in the construction of railroads, enacted, "*that there be*, "*and is hereby granted* to the State of Wisconsin," every alternate section of land designated by odd numbers, for six sections in width on each side of the road, as it should thereafter be located.

The effect of this grant was considered in *Schulenberg* vs. *Harriman*, 21 Wal., 44. In this case the Court said: "That the Act of Congress of June 3, 1856, "passed a *present interest* in the lands designated, there "can be no doubt. The language of the first section "is '*that there be and is hereby granted*' to the State of

"Wisconsin the lands specified. The third section "declares that said lands *hereby granted* to said State "shall be subject to the disposal of the Legislature "thereof."

Here the identity of the lands granted depended, not only on the public surveys, but upon the location of the road by the grantee.

The Act of September 28, 1850, concerning swamp and overflowed lands, declared that those lands "are hereby granted to the States."

The third section says that all legal subdivisions, the greater part of which is wet and unfit for cultivation, shall be included as swamp lands; but where the greater portion is not of that character the whole of it shall be excluded. It thus appears that the description of a large portion of these lands—indeed, the whole of the boundary lines thereof—depended on the public surveys—the grant only furnishing a criterion by which those lines might be located; yet in *Railroad Co.* vs. *Smith*, 9 Wal., 95, the Supreme Court of the United States said of this grant: "Now, here is a pres- "ent grant by Congress of certain lands to the State "within which they lie, but it is by a description "which requires something more than a mere refer- "ence to their townships, ranges and sections, to iden- "tify them as coming within it."

In *Leavenworth, etc. R. R.* vs. *U. S.*, above cited for another purpose, it was decided that where Con-

gress enacts "*that there be and is hereby granted*" to a State to aid in the construction of a railroad, "*every alternate Section of land designated by odd numbers*" within certain limits on each side of the road, the State takes an *immediate interest* in the land so situate; the words of the grant vest a *present title* in the State, although a survey of the land, and a location of the road, are necessary to give precision to it, and to show to what particular tracts it attaches.

In the case of the *Central Pacific R. R. Co.* vs. *Dyer* (C. C.), 1 Sawyer, 643, it was held by Mr. Justice Field that the Congressional grant of the right of way to said railroad company embracing 200 feet on each side of its road, in words of the present tense, "be and is hereby granted," took effect at the date of the grant, as against purchasers from the government between the date of the grant and the time of the location of the road, although it was not known, and could not have been ascertained what land would be taken by the grant until after the road was located.

In *Kernan* vs. *Griffith*, 27 Cal., 87, it was decided that the Swamp Land Act of September 28, 1850, vested in the State of California the absolute ownership of all said lands then undisposed of; and that the title of the State does not depend upon the issuance of a patent from the United States, or a survey by the United States; although the second section of

the Act provides for a selection of the lands by the Secretary of the Interior, and a patent from the United States.

To the same effect is *Branch* vs. *Mitchell*, 24 Ark., 444.

The eighth Section of the Act of Congress of September 4, 1841, enacts that "there shall be and hereby is granted to each new State that shall be hereafter admitted into the Union, upon such admission, * * * for purposes of internal improvement, * * * 500,000 acres of land, to be selected as aforesaid."

In *Doll* vs. *Meador*, 16 Cal., 315, speaking of this grant, the Court, by Mr. Justice Field, said: "Under it, upon her admission, California acquired a *present* and *vested interest* in the quantity designated; with a right to select and locate the same, in such manner as her legislature might direct."

To the same effect is *Van Valkenburg* vs. *McCloud*, 21 Cal., 330

See also *Balance* vs. *Tesson*, 12 Ill., 326, and *Dequindre* vs. *Williams*, 31 Ind., 444.

But the very Act under consideration—the Act of March 3, 1853. granting Sections 16 and 36 to the State of California—came before the Supreme Court of California for construction, in *Higgins* vs. *Houghton*, 25 Cal., 254, and the Court, by Mr. Justice Shaf-

ter said of it: "The language of the grant is too ex-
"act and luminous to require or admit of any resort
"to construction. There is no statement of any con-
"dition, exception, reservation, or limitation; and in
"our judgment the grant vested in the State a quan-
"tity of land equal to one thousand two hundred and
"eighty acres, multiplied by the number of townships
"into which the public lands in California were capa-
"ble of being divided, *the moment the Act received the*
"*signature of the President.*"

It was also decided in the same case that the 16 and 36 Sections on the public mineral lands were included in the grant.

The Act to enable the people of Nevada Territory to form a State Government, approved March 21, 1864, enacted "that Sections numbered 16 and 36 in every "township, and where such sections *have been sold or* "*otherwise disposed of by any Act of Congress*, other lands "equivalent thereto, in legal subdivisions of not less "than one-quarter section, and as contiguous as may "be, shall be and *are hereby granted* to said State for "the support of common schools."

In *Heydenfeldt* vs. *Daney Gold and S. M. Co.*, 3 Otto, 634, it is expressly admitted by the Court, that the words of the Nevada statute evinced a present grant, the Court saying that it was "the evident intention "of its (the statute's) makers to grant to the State, *in* "*presenti*, a quantity of lands equal in amount to the

16th and 36th sections in each township;" and it was impliedly admitted, in the same case, that the grant included sections 16 and 36 of the mineral land, for it was admitted as a fact in the case, that the land in question—part of a 16th Section—was mineral land; and it was taken out of the grant only by virtue of the exception contained in the statute, as having "been disposed of by Act of Congress," which exception applied to all other lands, as well as to mineral lands. If the mineral lands had not been included in the grant, a simple decision to that effect would have disposed of the case, without considering whether they had been "disposed of by Act of Congress," or not; but when the decision was made to depend wholly upon the question, whether or not the land had "been sold or otherwise disposed of by Act of Congress," it was thereby necessarily implied that if the land had not been so sold or disposed of, it would have been within the grant, and that every mineral Section 16 and 36 not so sold or disposed of, went to the State. In other words, it must have been assumed by the Court, that both the grant and the exception applied alike to mineral and agricultural lands. The only propositions decided in the case were, 1st, that the exception included sales and dispositions made by Congress after the date of the grant, and 2d, that the land in question had been disposed of by the Act of Congress of July 26, 1866, before it was surveyed, and therefore was within the exception. The first of

these propositions was placed on the grounds that the language of the exception could have no effect whatever, unless applied to sales and dispositions made after the date of the grant, as it was well known that Congress had made no such sales or dispositions before the grant; and the further ground, that the State had ratified a subsequent Act of Congress reserving all mineral lands from sale, and excluding them from the rectangular system of survey.

No part of the decision, except that holding that the statute effected a grant *in presenti*, is applicable to the grant to California; for lands "sold or otherwise disposed of by Act of Congress," are not excepted from the California grant. Nor has California ratified or acquiesced in any subsequent Act of Congress changing or construing the original grant; but, on the contrary, has persistingly claimed Sections 16 and 36 on the mineral lands.

In *Sherman* vs. *Buick*, 3 Otto, 209, the plaintiff claimed title to part of a Section 16 by patent from the United States, as a pre-emption settler upon the land, before it was surveyed, and offered to prove a settlement on the land in December, 1862, and that the section was not surveyed until August, 1866. This evidence was objected to on the ground that, by the ~~third~~ *proviso* to the 6th Section of the Act of March 3, 1853, no pre-emption settlement could be made on unsurveyed land "unless the same be made within

"one year from the passage of this Act" (March 3d, 1853), and that plaintiff's settlement. by his own showing, was not made until December, 1862, more than nine years after the passage of said Act of 1853. The State Court sustained this objection, and excluded plaintiff's evidence of his pre-emption settlement.

On appeal to this Court. it was decided that said third *proviso* in the 6th Section does not apply to the school sections; "that it was the purpose of the 7th Section to provide a rule for the exercise of the right of pre-emption to the school lands granted by the 6th Section;" and, as to the nature of the settlement required by the 7th Section to secure the right of pre-emption on the school sections, that "it was sufficient if it was by the erection of a dwelling-house or by the cultivation of any portion of the land." But the Court expressly declined to decide what was the effect of the school grant to the State "as to the time when the title vested in the State," saying that such questions "are immaterial to the issue."

In *Water and Mining Co.* vs. *Bugby*, 6 Otto, 165, it was decided, that unless the pre-emption settler on a 16 or 36 Section file the usual notice of his claim within three months after the return of the plats of the surveys to the land office, as required by the 6th Section of the Act of March 3d, 1853. he loses his right of pre-emption, and the title of the State becomes absolute upon the survey of the land in the

field—being no longer subject to the condition of the right of pre-emption by any settlement on the land, and, "as against all the world, except the pre-emption settler, the title of the United States passed to the State upon the completion of the surveys."

The unquestionable result of the adjudged cases, construing legislative grants, *in presenti*, like that of the school sections to California is, that such grants pass the title to the grantee, the moment the granting act becomes a law; especially, if the grantee, named in the act, is then in existence, and competent to take. In such grants, there is no progressive succession of steps or acts, necessary to complete the title, as there may be in the cases of pre-emption settlers, and purchasers of mineral lands; and therefore, no necessity for the application of the "doctrine of relation." The legislative act making the grant, in the present tense, is the beginning and the end of the grant. Nothing remains to be done by either party, but to apply the description contained in the grant, to the land, as in cases of grants from, and to, natural persons. If, by means of the description in the grant, and the law, applicable thereto, the land granted may be identified, the grant is good, and takes immediate effect; otherwise, it is a nullity. There is no exception to the legal maxim—"that is sufficiently certain, which is capable of being rendered certain."

After one of these grants has passed the legislature, all questions as to its sufficiency and effect, must be

determined by the judical department. The legislature has no farther jurisdiction over it, nor any power to resume, or to nullify its grant.

Fletcher vs. *Peck*, 6 Cranch, 87.
Terrett vs. *Taylor*, 9 Cranch, 43.
Pawlett vs. *Clark*, 9 Cranch, 292.
Rice vs. *Railroad Co.*, 1 Black, 359.

The "*Suscol Ranch cases*" have no proper application here. There was *no grant* to the settlers on the Suscol Ranch; and, it was decided that the Government was under no obligation to make such grant; because, the settlers had not paid for the land. But there was a grant of the school sections, to the State of California, and no payment of purchase money to be made, or other condition to be performed by the grantee.

II.

The only exceptions or qualifications to this general grant are to be found in the Seventh Section of the Act. They are, that the State shall select and take other lands in lieu of the 16 and 36 sections, in place, agreeably to the provisions of the Act of Congress of May 20th, 1826, in the following cases:

1. Where any settlement, by the erection of a dwelling-house or the cultivation of the land, shall be made upon the 16 and 36 sections before the same shall be surveyed.

2. Where such sections may be reserved for public uses; and

3. Where they may be taken by private claims.

The first of these three exceptions refers only to lands subject to pre-emption, and therefore does not refer to the mineral lands which are excepted from the operation of the pre-emption laws by the 6th Section.

The "settlement by the erection of a dwelling-house or the cultivation of any portion of the land" mentioned in the 7th Section undoubtedly means a pre-emption settlement, such as is provided for in the 6th Section. And it was so decided in *Sherman* vs. *Buick*, and in *Water and M. Co.* vs. *Bugby*, above cited. In the former of these cases this Court said: "It was the purpose of the 7th Section to provide a rule for the exercise of the *right of pre-emption to the school lands granted by the 6th Section.*" And as to the nature of the settlement required by the 7th Section to secure the right of pre-emption on the school sections, the Court further said: "It was sufficient if it was by the erection of a dwelling-house or by the cultivation of any portion of the land." And in the latter case this Court said: "As against all the world, except *the pre-emption settler*, the title of the United States passed to the State upon the completion of the surveys." And the principal point decided is that the title did pass

to the State, notwithstanding that Bugby and others were actual settlers upon the land, having "thereon a dwelling-house and agricultural and other improvements," before and at the time of the survey of the land; and this decision is expressly placed upon the ground that Bugby and others in possession, had not filed in the United States Land Office the usual notice of their pre-emption claims, as required by the 6th Section.

But in addition to all this, the last clause of the 7th Section provides that no person "shall obtain the benefits of this Act by a settlement or location on mineral lands." It cannot be doubted that this refers to the "settlement by the erection of a dwelling-house," etc., mentioned in the first part of the same section; yet the defendant in error claims to have "obtained the benefits of this Act by a settlement on the mineral lands" in dispute. By virtue of such "settlement or location," it claims the "benefits" conferred by the 7th Section "of this Act," according to its construction of said section, viz: the right to the possession of said lands at, and since the time of the survey thereof, and the right to acquire the title thereto from the United States, as against the State of California. Indeed, the alleged title of the defendant in error to said lands, with all the benefits incident thereto, are made to depend upon the 7th Section "of this Act." But for this section, as construed by defend-

ant in error, the title to said lands passed to the State of California, and thence to the plaintiff in error.

What object had Congress in excepting from the school grant, lands upon which "settlement" had been made before survey, if not to confer some right or benefit upon the settler? Was the settlement referred to or adopted merely as a descriptive mark by which to distinguish the lands excepted from those not excepted? If so, why were lands thus marked excepted, rather than lands marked by deposits of the precious metals, or by the growth of live-oak trees?

As a correct and most pertinent answer to all these queries, we produce the following extract from the able printed brief of one of the learned counsel (Gen. Nourse) for the defendant in the Court below:

"What possible reasons could be given for holding "such sections (16 and 36) excepted from the grant "when the settlers—for whose benefit alone the ex- "ception is made—have themselves abandoned all "claim under such settlements? * * * The ex- "ception in Section 7 is made for a purpose—to pro- "tect the rights of settlers."—Page 35.

But, by the last clause of the 7th Section, these benefits and rights are denied settlers and *locators* on the mineral lands—the word "location" being peculiarly applicable to mining claims, seems to have been used *ex industria*, to exclude mining claimants.

But admitting that a locator or settler upon a mineral section 16 or 36 can obtain none of the benefits of the Act, yet it has been argued that such location or settlement before survey has the effect to defeat the grant to the State by the terms of the exception; and that the settlement described in the exception was intended merely as a mark by which to distinguish the lands excepted from the grant, &c.

This argument was overruled by this Court in *Water & M. Co.* vs. *Bugby*, in which the precise point arose and was necessarily decided, as we have already shown.

2. As to the second exception, we are not aware that it is claimed that any part of the mineral land has been "reserved for public uses" Simply omitting to provide for a sale of them, or expressly reserving them from sale, without expressing or implying some public use, to which they were to be devoted, would not be a reservation for a public use. Nor was the opening of them to exploration and sale by the Acts of July 26, 1866, and of May 10, 1872, a reservation in any sense, for any purpose; besides, these subsequent Acts of Congress expressly relate to "the mineral lands of the *public domain*," and the mineral "lands *belonging to the United States*," and will not be construed to embrace land disposed of, or appropriated by the Government before their enactment.

Rutherford vs. *Greene's heirs*, 2 Wheat., 202.

Wilcox vs. *Jackson*, 13 Pet., 509.
United States vs. *Gear*, 3 How., 120.
Leavenworth, etc. R. R. Co. vs. *U. S.*, 2 Otto, 745.
Newhall vs. *Sanger*, 2 Otto, 761.
Beecher vs. *Wetherby*, 5 Otto, 524.
State vs. *Delesdenier*, 7 Texas, 76.
Spaulding vs. *Martin*, 11 Wis., 274.
Canal Trustees vs. *Haven*, 10 Ill., 548.
Kennett vs. *Cole County Court*, 13 Mo., 139.
Russell vs. *St. Louis Public Schools*, 16 Mo. 563.

In *Rutherford* vs. *Greene's heirs*, the Court, by Chief Justice Marshall, say: "that a general permission to "enter lands within a given tract of country, must, of "necessity, be limited to lands not previously ap- "propriated."

In *Wilcox* vs. *Jackson*, 13 Pet., 509, the Court said: "Whenever a tract of land shall have once been legally "appropriated to any purpose, from that moment the "land thus appropriated becomes severed from the "mass of public lands, and no subsequent law, or "proclamation, or sale would be construed to embrace "it, or to operate upon it, although no reservation "were made of it."

This opinion was more than affirmed in *United States* vs. *Gear*, 3 How., 120, where it was decided that a power by statute to sell all lands within a certain dis-

trict, cannot be construed to mean a power to sell land containing lead mines in that district, which were reserved from sale by a former Act of Congress, unless the lead mines are named in the subsequent Act.

In *Leavenworth, etc., R. R. Co.* vs. *The United States*, 2 Otto, 745, the same rule of construction is applied to a statutory grant of land to a railroad company in words, which would embrace land, that, before the date of the grant, had been reserved to the Indians. Held that the grant could not be construed to embrace the Indian reservation, or even such title to it, as the Government was admitted to have had, at the date of the grant, although it had not been excepted from the grant. In this case the Court emphatically affirm, the case of *Wilcox* vs. *Jackson*, and further say, that the rule of construction laid down in that case is more appropriate to cases in which third parties (as Indians and prior grantees) are interested, than to cases in which the Government alone is interested, as it was in that case.

The same rule of construction is adopted in *Newhall* vs. *Sanger*, 2 Otto, 761, where it is held, among other things, that the words "public lands" are used in Congressional legislation to describe such lands as are subject to sale or other disposition under general laws; and also that a claim under a fictitious or invalid Mexican or Spanish grant constituted a "private land

claim" in the sense of the Act of 1851 for the settlement of private land claims in California, and of the Act of March 3, 1853; and that the lands to which such invalid claims were made, did not become part of the public land, until the claim was regularly rejected, or barred by the lapse of time prescribed by the statute.

Without the application of this rule of construction, the Desert Land Act of March 3, 1877, would authorize the sale of all 16th and 36th Sections, on all desert lands west of the Rocky Mountains, whether surveyed or unsurveyed; and the Act of June 3, 1878, for the sale of timber land, would authorize the sale of 16th and 36th Sections on all timber lands in California, Oregon, Nevada and Washington Territory, for those sections, in place, are not excepted from this Act. Many other illustrations of the unjust and absurd results of any other rule of construction than that supported by the cases above cited, might be adduced.

Formerly, the Government reserved one-third part of all gold, silver, lead and copper mines. *Ordinance of May* 20, 1785; *Land Laws* (Senate compilation), p 11. Later, and after abandoning this policy as to gold, silver and copper mines, the Government, for a time, reserved lead mines and salt springs and leased them. See Act of March 3, 1807. But this was also abandoned in 1846—*Act of July* 11, 1846; 9 *St. at Large*, p. 37—and no such policy ever had any application to

California. The Government has never proposed to make any other use of its mineral lands in this State than to sell them to citizens. And there is no more ground for the pretense that the public mineral lands have been reserved for public use than for a like pretense as to all the public desert lands, timber lands and agricultural lands.

3d. The third exception applies to all cases where Sections 16 and 36 "may be taken by private claims." Undoubtedly this refers only to the "foreign grants or titles," mentioned in the preceding (6th) Section, for the following reasons:

a. That there was, and could have been no other kind of private claims to land in California at the date of the Act of March 3, 1853, since no interest in such land had then been granted by the United States; and that Act authorized no private claim or interest to be granted or created in Sections 16 and 36, except in favor of pre-emption settlers, who were excluded from the mineral lands, and whose case was provided for by the first exception, above considered, and therefore could not have been intended to be the subject of the third exception, which we are now considering. Sections 16 and 36 were expressly excepted from the sales authorized by the Act of 1853, which precluded the possibility of any private interest in them being created by such sales.

b. The Act of 1853 made no provision for the sale of mineral lands, or lands "deemed unfit for cultivation," and it was then uncertain when or how Congress would dispose of these lands; therefore no "private claims" in these lands could have been referred to or contemplated by Congress, other than "foreign grants," or grants *thereafter to be authorized* by Congress.

c. But Congress never thereafter authorized any sale or grant of the 16 and 36 Sections on mineral lands, or lands deemed unfit for cultivation, unless the authority for such sale or grant was implied in the general authority to sell "the mineral lands of the *public domain*," or the "mineral lands *belonging to the United States*," or the "desert lands," conferred by subsequent Acts of Congress. But we have shown by the authorities above cited under the second exception, that no such authority can be implied in those subsequent Acts of Congress.

d. There is no reason to doubt that Congress used the words "private claims," in the Act of March 3, 1853, in the same sense in which Congress used the same words in the Act of March 3, 1851, "for the settlement of private land claims in California," where there can be no question that they were used to designate "foreign grants" alone.

e. But the third exception did not refer to, nor

contemplate, private claims to arise from any grant or disposition to be *thereafter* made by Congress. Had such been the intention, apt and appropriate language would have been employed to express it, as in the enabling Acts of Nebraska and Nevada. In the enabling Act for Nebraska, passed April 19, 1864, the 16th and 36th Sections are granted to that State, except when those sections "*have been disposed of by any Act of Congress;*" and the language of the Nevada Act is, "where such sections *have been sold or otherwise disposed of by any Act of Congress.*" In the grants of school lands to most of the other States, the language of the exception is, "where such section has been sold, granted, or disposed of," or simply, "when such section has been *disposed of.*" But no such language, nor any language equivalent in meaning, is to be found in the Act granting Sections 16 and 36 to California. In this Act the language is, "where such sections may be taken by private claims." This does not mean the same as "sold, granted, or disposed of by Congress;" and certainly not, when it may have full and complete effect by application to private claims, known to exist at the date of the Act, and which did not arise from any disposition or Act of Congress, viz.: "private claims" arising from the "foreign grants" mentioned in the preceding section of the same Act.

Nor does the language imply that the grounds on which these "private claims" were based, might arise or come into existence, at any future time; but only,

that the lands might *be taken* at a future time by virtue of grants or claims *then existing.*

From the foregoing (without considering the objections which have been urged) the following conclusions seem inevitable:

1. That by the Act of March 3, 1853, Congress granted to the State of California the 16th and 36th Sections on all the public lands within the State, with the three exceptions stated in the Seventh Section of the Act.

2. That the first of these exceptions does not apply to mineral lands, under any circumstances.

3. That the second applies only to reservations by the Government for public uses, which do not include the demanded premises.

4. That the third exception applies only to private land claims, derived from foreign grants, made before the date of the Act of March 3d, 1853.

5. That said grant took effect immediately upon the passage of said Act, and by a description capable of being rendered certain, irrevocably conveyed to the State of California, in divided parcels, a quantity of land, equal to one sixteenth part of all the public domain within the State, *minus* the exceptions above considered.

6. That the demanded premises are part of the land so granted to said State, whose identity was rendered certain, by means of said description, in March, 1870.

III.

It has been urged by eminent counsel that the grant of the School Sections to California did not include any part of the mineral lands for the following reasons:

1st. That whilst the Act making the grant authorized the sectionizing of all lands deemed fit for cultivation, it only authorized the survey of the township lines "when the lands are mineral, or are deemed unfit for cultivation."

2d. That to dispose of the mineral lands for any purpose was against the uniform policy of the Government until the 26th day of July, 1866, when the Government first authorized the sale of the mineral lands in California.

3d. That the mineral lands are excepted from all other grants to the State, made in the same Act, and also from the rights conferred upon pre-emption settlers, and therefore Congress intended to except them from the school grant.

4th. That it would be inequitable for the State to take the mineral sections—16 and 36—from the min-

ers, who, by permission or acquiescence of the United States, occupied them before survey, and therefore that the United States should protect the possession of such miners.

As to the first ground of objection, that only township lines, on mineral lands, were authorized to be surveyed, it may be answered:

a. As we have already seen, that no other than township lines were necessary to locate Sections 16 and 36 with certainty. Ever since the initiation of our system of public land surveys by the ordinance of May 20, 1785, the mode of dividing a township into 36 lots or sections, has been prescribed by law, and has remained the same. That ordinance reserved "lot "No. 16 of every township for the maintenance of "public schools within said township;" yet, it provided that only the township lines should be actually surveyed, marking them at intervals of one mile or two miles for corners of adjacent lots or sections, according to the system which has ever since prevailed. But no line was surveyed, or authorized to be surveyed, and no corner was marked within two miles of Section No. 16; yet, all the lines and corners of that section could be easily ascertained, and made certain, from the survey of the township lines, and the law prescribing the mode of dividing the townships into 36 lots.

Blunt's Lessee vs. *Smith*, 7 Wheat., 278.

Indeed, the same ordinance provided for a sale of said lots by numbers, without further survey; and we have never heard or read of any objection to the title of the purchasers on the ground that there was no survey, or law authorizing a survey of the lots at the time they were sold.

The enabling Act of Ohio, approved May 1, 1802, provided "that Section No. 16 in every township, and "where such Section has been sold, granted or dis- "posed of, other land equivalent thereto, and most "contiguous to the same, shall be granted to the in- "habitants of such township, for the use of schools."

At the time of the passage of this Act, the law governing the survey of the public lands of the Territory authorized the sectionizing of only a portion of the townships; yet Ohio got every foot of land granted by the Act without question.

When the law authorizing the formation of a State Government for Nevada, and granting to that State Sections 16 and 36 for school purposes, was passed (March 21, 1864), no law of Congress authorized the survey of townships, even, in that territory, except on the written petition and at the expense of such private persons as might desire the survey of particular townships, embraced by existing base and standard lines, when but a small portion of the territory was embraced by such lines.—Act of July 2, 1862, 12 St. at Large, 503.

Will it be contended that Congress intended to give to the State of Nevada only such Sections 16 and 36 as fell within such townships as might be surveyed at the instance and expense of private persons, and embraced within then existing base and standard lines?

The Act of Congress granting to California the swamp lands was passed long before the existence of any law extending the public surveys to California; yet, as we have seen, the boundary lines of the swamp lands did not coincide with the actual boundaries of the swamp lands, and could only be ascertained by a survey into the smallest legal subdivisions, according to the system of Government surveys.

Thousands of acres were given to the State which were not actually swamp lands, and thousands of acres were withheld which were swamp lands in fact, yet all the courts have decided, and it is admitted on all hands, that the title to the swamp lands, as authorized to be surveyed long subsequent to the grant, vested in the State a valid title at the date of the grant.

b. The same ground of objection extends to all lands in the State "deemed unfit for cultivation," and denies to the State any school sections therein; for, these lands were also excluded from the survey of other than township lines, by the Act of 1853.

The lands "deemed unfit for cultivation" included all the mountain timber lands above the agricultural

altitude, all the merely grazing lands, and all the desert lands.

Is it probable, or even possible, that, contrary to its ancient, persistent, and most cherished policy, the Government intended to deny to the State of California any appropriation of land for school purposes, in all the vast regions unfit for cultivation, and in the mineral lands, without giving any other lands in lieu thereof?

The fact that no lands are given in lieu of the mineral lands, and lands unfit for cultivation, is a strong circumstance against the construction excluding the mineral lands from the grant.

c. It was sufficient for the purpose of the grant of the 16 and 36 Sections, as already shown, to survey the township lines, but for the purpose of settlement on agricultural lands a subdivision of the townships was necessary. There was then no demand for timber, pasture or desert lands, but pre-emption settlers wanted the agricultural lands for immediate use, and Congress simply provided for that want, without any intention of depriving the State of the usual grant for school purposes.

2. As to the objection grounded on the alleged policy of the Government not to dispose of the mineral lands, we have to say, that we are not aware of any such policy, or of any other continuously uniform

or consistent policy of the Government as to the disposition or reservation of the mineral lands. Originally, as already remarked, the Government, in the sale of public lands, reserved one-third part of all gold, silver, lead and copper mines, but this policy was only continued from 1785 until 1807; after which, and until 1846, the lead mines and salt springs only, were reserved from sale; but during this period there was a debated question as to whether the copper mines were lawfully reserved or not, which was finally decided in the negative.—*Cooper* vs. *Roberts*, 18 How., 175.

During the same period the Government leased the lead and copper mines, but this policy was abandoned in 1846, when these mines were offered for sale.—9 St. at Large, p. 37.

Upon the discovery of the gold mines in California, the Government pursued a policy as to them totally different from any former policy, and from the then existing policy as to the mineral lands in the Eastern States. It neither offered the mineral lands in California for sale, nor leased them, nor made any use of them for its own benefit; but suffered them to be trespassed upon, and despoiled of their treasures by all comers, including Chinamen and Kanaka Indians, until the 26th day of July, 1866, when it offered a portion of them for sale, and, four years later, provided for the sale of the residue. It thus appears that at

the date of the passage of the Act of March 3, 1853, the policy of the Government as to the mineral land in California, if it then had any policy, was entirely different from any former policy, and from the then existing policy in other States, and that the California policy has been twice changed since 1853.

If the policy argument is to have any weight, it is vastly more in favor of donating to the State, a portion of every township of the public lands for the support of schools. This policy was initiated by the ordinance of 1785, emphatically affirmed by the ordinance of 1787, and reaffirmed on the admission to the Union of every new State. Its only departure from uniformity has consisted in giving an increased proportion of the public domain for the support of schools. Starting with one thirty-sixth part, it has been increased to one eighteenth part of each Township.

As to this policy of the Government to donate lands for the support of schools, we invite attention to the opinion of Mr. Justice Campbell, in *Cooper* vs. *Roberts*, 18 How. 177, and to the opinion of Mr. Justice Daniel, on the second appeal of that case, 20 How. 485.

In speaking of the opinion on the first appeal, Mr. Justice Daniel said:

"That case was elaborately discussed by counsel; "was, as the opinion of the Court evinces, deliberately

" considered; the theory and objects of the system
" adopted by the Government for the distribution of
" public lands carefully examined, correctly expound-
" ed, and properly sustained by the decision. In the
" reasoning of the Court, the cherished objects aimed
" to be secured by that theory, viz.: the advancement
" of 'religion, morality and knowledge,' as indispensa-
" ble for the existence of good government, and for
" the happiness of mankind; the obligation for the
" maintenance of schools and the means of education
" as necessary for the ends proposed, as declared in
" the third article of the ordinance of 1787, are prom-
" inently and correctly set forth as guides in the in-
" terpretation and application of the policy and sys-
" tem of the Government in disposing of the public
" domain. It seems scarcely to admit of rational
" doubt, that it was in pursuance of this policy, and
" as deemed best calculated for its successful accom-
" plishment, that in the surveys made, or to be made,
" of the public lands, the Sixteenth Section of every
" township, being central (and therefore more than
" any other section could be), connected with the sev-
" eral interests of the township, was appropriated for
" the use of schools. Admitting this to be the policy
" and theory of the Government, designed as it has
" been declared to lay the foundation of social and
" political good, it would seem to follow that nothing
" short of the highest and most overpowering public
" considerations, or an absolute inability or want of

" power, should be permitted to defeat, or in any de-
" gree to control them. Surely speculations for pri-
" vate emolument, and still less such as might be at-
" tempted through the exercise of irregular or doubt-
" ful authority should not be permitted to affect
" them."

3d. As to the ground of objection that the mineral lands were excepted from all other grants of land by the same Act of Congress, we may be permitted to say, that to claim this as a ground of objection to our construction requires some degree of impudence, in view of the maxim, "*expressio unius est exclusio alterius*," which is not only a presumption of law, but the expression of a fact of every-day experience. The expression of exceptions to the other grants, shows that the attention of Congress was directed to the matter, as to what exceptions should be made from the several grants, and when so directed, the presumption of fact and of law is, that Congress expressed all the exceptions intended to be made, and did not intend to make any exception not expressed.

But, it has been said that Congress considered that it had already excepted the mineral lands from the school grant, by providing that only township lines should be surveyed on those lands.

This will not do; for, besides what already has been said on this point, it is pertinent to inquire, if the exclusion of the mineral lands from the sectional

surveys was intended by Congress to serve the purpose of excepting them from the school grant, why was it not allowed to serve the purpose of excepting them from the other grants, to which purpose it was equally adapted?

It will hardly be contended that Congress considered the exclusion of the mineral lands from sectional surveys a sufficient exception of them from the grant of Sections 16 and 36, but not a sufficient exception of them from the grant of seventy-two sections for a seminary of learning, and of ten sections for public buildings. This view of the alleged exception shows conclusively what should be presumed without any showing—namely, that Congress expressed all the exceptions intended, and did not intend any exceptions not expressed; or, in other words, that Congress intended what it said—nothing more—nothing less.

4th. As to the objection grounded on the alleged acquiescence of the United States in the possession and operations of the miners on the public mineral lands, and the consequent obligation of the Federal Government to protect such possession, we remark:

a. That the only evidence of such acquiescence on the part of the Federal Government, prior to July 26th, 1866, is the fact that the Government failed expressly to complain of these known trespasses, by the miners, upon its mineral lands, or to take measures to

remove or prosecute the trespassers. But the same is true of trespassers on the public agricultural and grazing lands. Trespassers upon these lands have been openly and continuously protected by the Legislatures and Courts of California, since the 11th day of April, 1850, when the Legislature passed an Act entitled "An Act prescribing the mode of maintaining and defending possessory actions on lands belonging to the United States."

This Act was superseded and repealed by Act of April 20th, 1852, bearing the same title, and effecting the same purposes.

Under these Acts locations of lots of 160 acres were made in all parts of the State, and most extensively on the unsurveyed agricultural and grazing lands in the mineral regions. On these lots dwelling-houses were erected, orchards and vineyards were planted and cultivated, and all kinds of agricultural and other improvements were made.

By the decisions of the Courts of the State these statutes were upheld and enforced, and the settlers upon these lots were protected in their possessions until the United States sold the lands.

4 Cal. Rep., 412; 5 Cal., 36, 97, 140, 164, 308 and 393; 6 Cal., 144 and 148; 7 Cal., 297; 11 Cal., 104; 14 Cal., 378; 15 Cal., 46, 85 and 93; 16 Cal., 567; 17 Cal., 274 and 352; 21 Cal., 254 and 354; 22 Cal., 444; 23 Cal., 452; 28 Cal., 331; 35 Cal., 152; 39 Cal., 276; 42 Cal., 653 and 149.

Of course, the United States had notice of these notorious settlements and improvements upon its lands, and of their recognition and protection by the Legislature and Courts of the State, and acquiesced in and encouraged them in the same manner, and to the same extent, as in the case of the locators of mines. Why is not the Government bound to protect these possessions and improvements, as well as those of the miners?

b. The acquiescence of the United States in trespasses upon lands belonging to the State of California ought not to oblige the United States to take such lands from the State and give them to the trespassers. Nor should the fact that a trespasser upon the land of another has extracted therefrom a large portion of the substance of the owner's estate therein be accepted as an equitable reason why he is entitled to the residue. In this case it is alleged in the complaint (fol. 33) and not denied in the answer (and therefore admitted as a fact on the judgment roll) that from March, 1872, until March, 1874, the defendant extracted from the demanded premises mnierals of the value of $288,000. Against this, the defendant asks to set off, as improvements on the land, the shafts, drifts and other excavations dug and made in mining the land during fifteen years next preceding the commencement of this action. How much gold was extracted during thirteen of said fifteen years did not appear, for the rea-

son that plaintiff was entitled to recover only for the time subsequent to the date of the assignment to him of the State's certificate of purchase given to Casey, the original applicant to purchase the land.

After the stockholders of the defendant corporation have realized fortunes from mining plaintiff's land, the corporation's appeal for sympathy on grounds of equity seem not only ridiculous but extremely impudent. If, in any case, a strained construction should be given to the law to preserve supposed equities this is not one of the cases calling for such construction in favor of the defendant.

c. In this connection it is proper to notice the late case of *Broder* vs. *Natoma W. & M. Co.*, decided by this Court at the October Term, 1879. From the opinion in this case we make the following extract:

"We are of opinion that it is the established doc-
"trine of this Court that rights of miners, who had
"taken possession of mines and worked and developed
"them, and the rights of persons who had constructed
"canals and ditches to be used in mining operations
"and for purposes of agricultural irrigation, in the re-
"gion where such artificial use of the water was an
"absolute necessity, are rights which the Government
"had, by its conduct, recognized and encouraged and
"was bound to protect, before the passage of the Act
"of 1866. And that the Section of the Act which we
"have quoted was rather a voluntary recognition of a

"pre-existing right of possession, constituting a valid "claim to its continued use, than the establishment "of a new one. This subject has so recently received "our attention, and the grounds on which this con- "struction rests are so well set forth in the following "cases, that they will be relied on without further ar- "gument: *Atchison* vs. *Peterson*, 20 Wall., 507; *Basey* "vs. *Gallagher*, Id. 670; *Forbes* vs. *Gracy*, 94 U. S. R., "762; *Jenison* vs. *Kirk*, 98 Id 459."

In this case the plaintiff, in an action to abate a portion of defendant's water ditch as a nuisance, and for damages caused by the alleged nuisance, claimed title to the land on which a portion of said ditch was constructed, through a grant from the United States to a railroad company, dated in 1864, and prior to the Act of Congress of July 26th, 1866, so that defendant could derive no advantage from the ninth section of said Act, as against the prior grant to the railroad under which plaintiff claimed title. Under these circumstances the respective rights of the parties depended solely upon the effect of the Congressional grant to the railroad company, as against the prior possession of the way for said water ditch by the defendant; and the Court decided that defendant's right of way for said ditch was expressly excepted from said grant to the railroad, and therefore that plaintiff had no right to abate the ditch as a nuisance, or to recover damages for its maintenance upon his land.

It was not necessary to decide what would have been the rights of the defendant in the absence of said exception in the grant to the railroad company. Had it been so, no doubt the Court would have more carefully considered the question, and particularly the cases cited in the above extract from the opinion.

Atchison vs. *Peterson*, 20 Wal., 507, was a bill in equity to enjoin defendant from fouling a stream from which plaintiff diverted water into his ditch for mining purposes. The defendants were miners operating fifteen miles above the head of plaintiff's ditch and there discharging from their mines muddy water and sand into said stream. The claims of both parties were upon the public lands, and plaintiff's diversion and appropriation of the water was prior to the location of defendants' mining claims. On these facts the Court held that plaintiff was entitled to the use of the water without material deterioration from defendant's mining operation.

But upon finding the further fact that defendant had not materially fouled the waters at the point where they entered plaintiff's ditch, the bill was dismissed and the plaintiff was left to such remedy as he might have at law. No question as to the right or title of either party as against the Government of the United States arose or was decided in the case. As between the parties the prior appropriator was said to have the better right, and to be regarded "as the

source of title * * * *except as against the Government.*" Thus expressly saving the rights of the Government, instead of deciding, as supposed, that the Government was bound to protect the possession or improvements of either party.

Basey vs. *Gallagher*, 20 Wal. 670, was also a bill in equity praying for an injunction against the diversion of water, to the use of which for agricultural purposes, both parties claimed the right. Neither party had title from the Government, and the Court carefully placed its decision on this hypothesis, saying: " It will be time enough to consider those rights (de- " rived from the Government) when either of the " parties has obtained the patent of the Government. " At present both parties stand upon the same foot- " ing; neither can allege that the other is a trespasser " against the Government without, at the same time, " invalidating his own title."

We are unable to find anything in this case indicating or implying that either party had any right, legal or equitable, as against the Government, which the Government was bound to protect or respect.

Forbes vs. *Gracey*, 4 Otto, 762, questioned the right of the State of Nevada to tax a mine on the public lands and the ores taken from the same. Held, that such mine and ores were property subject to be taxed by the State. But the decision is expressly put upon

the ground that Acts of Congress had granted to miners the right to explore, occupy and work the mines on the public lands—the Court saying that "such right as the mining laws allow, and as Congress concedes to develop and work the mines, is property in the miner" subject to taxation by the State. How this decision can be made to favor the proposition that the Government is bound to protect possessions on the public lands not sanctioned by any law of Congress, we are unable to understand.

Jenison vs. *Kirk*, 8 Otto, 453, decides simply that the 9th Section of the Act of July 26th, 1866, confirms such rights as ditch-owners before claimed by virtue of local customs, laws, and the decisions of the courts of the State, and the Court says: "The object of this (9th) Section was to give the sanction of the United States — the proprietor of the lands—to the possessory rights which had previously rested solely upon the local customs, laws and decisions of the courts, and *to prevent such rights from being lost on a sale of the lands*," p. 456. And on p. 460 it is assumed and expressed that the rights granted by the 9th Section of the Act of July, 1866, would have been destroyed by a Government sale of the land, "unless secured by the Act." And so it has been held in all cases where the Government sold the land before July 26th, 1866.

Union W. & M. Co. vs. *Ferris*, 2 Saw., 176.

Water Co. vs. *Bugby*, 6 Otto, 165.

In this last case the Court admitted that the Natoma Water Company had brought itself within the provisions of the 9th Section of the Act of July, 1866, by showing a location of its ditch on the public land, and the commencement of its construction in 1851, the completion of it in April, 1853, and continuous possession and use ever since. But because the United States did not hold the title to the land on the 26th day of July, 1866, the company lost so much of its ditch as passed over the demanded premises. Why did not the Court protect this ditch company in its possession, if the Government was bound to do so, irrespective of the Act of July, 1866?

This case also decides the point made by the defendant in error here, on the fact of the location of its "Spring Hill claim" in 1851, before the grant of the school sections to California. As the demanded premises were part of a 16th section, and plaintiff claimed title from the State, this point was necessarily decided against the defendant.

We most respectfully submit that the judgment of the Circuit Court should be reversed, and that judgment for the plaintiff should be ordered on the facts found.

STEWART, VAN CLIEF & HERRIN,
Attorneys for Plaintiff in Error.

OFFICE SUPREME COURT U.S.
FILED
OCT. 22 1880
JAMES H. McKENNEY, CLK.

Supreme Court of the United States.

OCTOBER TERM, 1880.

Ivanhoe Mining Company,
Plaintiff in Error,
vs.
The Keystone Consolidated Mining Company,
Defendant in Error.
No. 637.

BRIEF ON BEHALF OF THE STATE OF CALIFORNIA.

BENJ. F. BUTLER,
O. D. BARRETT,
Counsel.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1880.

Supreme Court of the United States.

THE IVANHOE MINING COMPANY,
PLAINTIFF IN ERROR,
v.
THE KEYSTONE CONSOLIDATED MINING COMPANY, DEFENDANT IN ERROR.

No. 637.

Brief in Behalf of the State of California, Grantor to Plaintiff in Error.

STATEMENT OF CASE.

This is a suit brought against the present defendant in the State court of California, and removed to the circuit court of the United States for the district of California, in the nature of a writ of ejectment to recover certain lands and damages to same, being the east half of section 36 in a certain township in said State, said section being a section granted to said State for school purposes in the township wherein it is situated.

The plaintiff claims the *locus de quo* under a patent from the State of California, issued October 3, 1872, of the eastern half of said section 36.

The regularity of the issue of said patent is not in dispute.

The main questions arise upon the title of the State to the lands patented.

The defendant claims small portions of said half section, shown by the descriptions and lines of a plat marked Exhibit "A," annexed to the record.

Portions of the land (about fifty acres) claimed by the defendant consist of supposed locations under the mining regulations. Another portion of the land claimed is what is marked on the plat as "Keystone Field," being a field cultivated for hay by one of the companies locating the mines before the consolidation.

A patent from the United States, bearing date July 7th, 1873, was issued to the defendant for the most northerly and easterly of the tracts represented on the plat marked "Keystone Consolidated Company," being the mining claims commonly known as "Spring Hill" and "Geneva." The other mining claims, the southerly and westerly of said two tracts, are known as the "Keystone Mining Claim." The Spring Hill Mining Claim was located in May, 1851; the Keystone Mining Claim, in 1853, (date not shown,) and the Geneva Mining Claim, October 12, 1863. All of said locations were made in accordance with the then existing local regulations of the mining district, and the customs of miners.

The locators of these mines, and those claiming under them, have worked the same, and held possession of them until the present time. The defendant has no patent or other paper title to the piece of ground known as "Keystone Field."

It is found that the demanded premises are "very valuable for mining purposes, and almost worthless for agricultural purposes."

Rec., p. 20.

The substantial contention between the parties is:

First. Whether the title acquired by the State of Cali-

fornia to section 36, granted by act of March 3, 1853, (10th Law, page 246,) is the superior title, or is the patent of the United States, issued July, 1873, to the defendant of its mining claims, situated within said half section, the superior title?

Second. If the State of California acquired any title to the eastern half of said section 36 under said act, then is it to prevail against the defendant's title to those parts of said half section claimed by it by naked possession only?

THE PLEADINGS IN THE CASE.

The plaintiff alleges—

First. That the defendant is an incorporated company of California, by the name described in the writ.

Second. That on the 27th day of March, 1872, the plaintiff was, and ever since has been and still is, the owner in fee-simple and entitled to the possession of the east half of section 36 of a certain township in a certain described range.

Third. That on said day the defendant, against the will of the plaintiff, entered upon said land and premises, and ousted and ejected plaintiff from the possession thereof, and from thence hitherto has detained and withheld the possession thereof from plaintiff, and still does detain and withhold said possession.

Fourth. That between the 27th day of March, 1872, and the 26th day of March, 1874, the defendant took out and removed from beneath the surface of said land minerals to the value of $288,000, and is still taking out minerals.

To this the defendant answered—

First. It denies that the plaintiff was ever the owner in fee-simple or otherwise, or entitled to possession of any part of said tract of land.

Second. It denies that at any time the defendant ousted or ejected said plaintiff from the possession of any portion thereof.

It denies that defendant did ever detain or withhold from the plaintiff the possession of, or have possession of, any portion of said tract, except the part thereof described as follows:

Then follows the description of certain mines and mining grounds, commonly known as "Geneva" and "Spring Hill" mining claims, the boundaries of which are not in dispute between the parties, containing $24\frac{70}{100}$ acres, being the same parcel of mining ground designated by the United States surveyor-general as lot No. 40, in said township, conveyed to this defendant by the United States by its patent, numbered 587, issued to the defendant as patentee, and bearing date the 7th day of July, 1873.

And a certain other mine and mining ground therein described, the boundaries of which are not in dispute, containing $31\frac{31}{100}$ acres, more or less, to which there is no allegation of title in the defendant.

And a certain enclosed field, containing about twenty acres, known as the "Keystone Field." To this piece also there is no allegation of title in the defendant. The description of all these pieces of ground shows that they are within the *locus de quo* of the plaintiff's declaration.

Fourth. The defendant further answers that said defendant never took out or removed from beneath the surface of any part of the land, *except* from the two parcels of mining ground hereinbefore first described, any gold quartz or any gold minerals whatever.

And for further defence, by way of set-off for damages claimed, said defendant says it held the three parcels of land before described, being severally portions of the land described in the complaint, and has more than five years

held the same in good faith under color of title adverse to the claim of the plaintiff; to wit, said mines and mining grounds, under and by virtue of their location and possession by the defendant and its grantors during a period of many years prior to the 23d day of March, 1872, and after said date to the issuance of patents therefor, July 7, 1873, and since then under said patents; and said "Keystone Field," under and by virtue of its possession by said defendant, and its grantors, for a period of more than fifteen years next preceding the commencement of this action.

And said defendant further says that it has made on said mines and mining grounds permanent improvements of great value, to wit, the value of more than $300,000, which said amount of more than $300,000 value of improvements, or so much thereof as may be necessary, the defendant asks to have allowed as a set off against any damages which may be allowed the plaintiff in this action.

Rec., pp. 11, 12, 13, 14.

The case came on to be heard before the judge of the circuit court without a jury, a trial by jury being waived, who made the findings of fact in the language of the stipulations on file, as set forth in four several items.

Rec., pp. 19, 20, 21, and 22.

The presiding judge held as a conclusion of law that no title to the demanded premises ever vested in the State of California, and that by the United States patent issued to the defendant the title in fee-simple absolute to the lands described therein passed to and vested in the defendant, and ordered judgment to be entered in favor of the defendant and against the plaintiff, in accordance with the foregoing, with costs, because of which judgment the plaintiff brings this cause to this court by writ of error.

ASSIGNMENT OF ERRORS.

I.

That the judge of the court below erred in finding as a conclusion of law that no title to any part of the demanded premises ever vested in the State of California.

II.

That the judge of the court below erred in finding that by the United States patents issued to the defendant the title in fee-simple absolute to the land described therein passed to and vested in said defendant.

THE TITLE OF CALIFORNIA.

It is not in dispute that by the 6th section of the act of March 3, 1853, (10 Sts. at L., p. 246,) the State received a grant of said land in these words:

"That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be, and hereby are, granted to the State for the purposes of public schools in each township," [then follow exceptions which do not apply to these 16 and 36 sections, which are themselves first exceptions,] "are subject to the pre-emption laws of the fourth September, eighteen hundred and forty-one."

Did any title to said section pass *in presenti* by these precise words of concession? The lands were then unsurveyed, and, as we shall see by the uniform chain of decisions in this court, a naked legal title passes *in presenti* to a grantee therein, being perfected when the public surveys segregate this granted portion of territory from the other public lands of the United States.

The facts find that the *locus in quo* was part of section

36, a school section, granted by the act of March 3, 1853, to the State of California. That public surveys were extended over the township in March, 1870, and the plat and survey were approved by the United States surveyor-general September 3, 1870, and the plat was filed in the land office at Sacramento for the district of lands wherein the township was located, October 7, 1870.

Rec., p. 22.

These findings of fact support the title of the plaintiff if the grant was competent and effective to convey the lands, and meet the first denial of the defendant.

The second averment of the answer of the defendant is that it never ousted or ejected the plaintiff from any portion of the land, except three certain portions described therein.

This portion of the answer, by the rules of law in an action of ejectment, would be a disclaimer of all the demanded premises, except that to which the defendant claims title. And in its answer it makes no claim of title save to the first portion of mining land, which is defectively, but, taken as a whole, substantially claimed under a patent of July 7, 1873, of the United States. It admits that it held possession of the second mining tract and of the "Keystone Field," but sets up no title thereto.

To the second and third pieces of land the defendant does not show any elder or better title, or connect itself in any way with any other title from a common source. Therefore, as to these it stands wholly without defence.

Greer *v.* Mezes, 24 Howard, 273.

Hardy *v.* Johnson, 1 Wallace, 373.

As to these last two mentioned parcels of land, and as

to the disclaimed portion of the *locus*, can a defendant in an action of ejectment put in issue the plaintiff's title, the plaintiff having shown a grant to itself of the demanded premises from a grantor, who received the title from the United States, an admitted elder owner?

As to the first described piece of mining land, in which the defendant has alone set up title in itself by patent from the United States, the issue is made only as to the strength of that title.

It will be observed that the patent to the defendent was not issued till after the plaintiff had received its patent.

It will be observed that the defendant by its answer (Rec., p. 11) claims no title whatever to any portion of the land, other than naked possession, except the "Spring Hill" and "Geneva" mines. As to those, the patent was granted to it of a certain date; to wit, July 7, 1873. That it held that title when this action was brought, in March, 1874, is not stated.

The patent set up in the answer, and the patent specified in the findings, are by the very force of the act of July 26, 1866, wholly void, as not being capable of being granted by the Land Office; because—

First. They were locations upon unsurveyed land.

Second. The land had been granted to the State of California.

Third. When the defendant applied to the surveyor-general, the State of California filed an adverse claim, and prosecuted it continuously until the issuance of the patent, all of which are found facts in the record.

4th Finding of Fact, p. 21.

In the condition of things above set forth, the 6th section of the act of July 26, 1866, (14 Stats., 251,) expressly prohibits the granting of a patent in such case until the

rights of the parties have been determined in the proper court.

The act of 1870 (16 Stats., 217) does not aid the patent of the defendants, because that only saves proceeding under the act of 1866, and in itself provides against the allowance of a patent in case of adverse claims.

This being the state of the defendant's title, can it, having no title whatever which it can claim through a common source, put in issue the demandant's title, under a plea of *nul disseisin?* If so, any person can intrude upon the land of another, and put him to prove title before he can get him off.

This would seem to be a sufficient answer to the 5th point in the defendant's brief, (p. 12,) that "it is competent in ejectment to show that at the time the State issued its patent to plaintiff's grantor it had not title to the lands in controversy, and that by the United States patent the title passed to the defendant."

That would be true if by the United States patent the title to any part of the lands passed to the defendant, because both would then be claiming under a common source of title, *i. e.*, from the United States, and the question would be, whether the title passed from the United States through the State of California to the plaintiff, or not having passed to the State of California, passed to the defendant.

But the defendant having no patent, if we are right as to the effect upon the patent of the adverse claim, it being issued without the judgment of a court, then the defendant has no title. And having disclaimed all title but the patent, it is not allowed to attack the plaintiff's title, which is made *prima facie* at least by the patent of the State of California, and certainly so far good against mere trespassers and intruders.

Among the objections to the plaintiff's title set up by the defendants, as shown by their brief, (p. 5,) is that the section 36 did not pass by the grant of the United States to the State of California, or any portion of it—

First. Because said section is mineral land.

Second. Because that, before the said land was surveyed, a house had been erected on said section and cultivation had been had.

Brief, p. 9.

If the erection of a dwelling-house on or the cultivation of any portion of the section does oust the State of California of its title to the whole section, we should have this absurd result: That if the party who cultivated the land, or erected the house on a small portion afterwards, instead of completing his pre-emption right, purchased the title to his premises from the State, he would find that he ousted himself of that title by his own improvements on the land. Not only that, but he would have thus ousted the title of everybody else who had settled upon the whole section and purchased like title.

Upon this point we contend that if the settler could settle on this land at all, which we deny, being mineral land; or if he could take advantage of any settlement which he might make on mineral lands, which we deny, that upon perfecting his settlement so as to ripen into pre-emption he would only oust the State of the title to the "particular piece of land" upon which his claim was made.

The object of the provision in favor of the settler was to protect him in the piece of land he claimed and not to oust the State of the whole remainder of the section, to retain which might be very desirable and valuable.

We are sustained in this doctrine by the case of Sherman *v.* Buick, (3 Otto, 209,) where the court uses the following language:

"These things being found to exist when the survey ascertained their location on a school section, the claim of the State to that particular piece of land was at an end; and, being shown in the proper mode to the proper officer of the United States, the right of the State to that land was gone, and in lieu of it she had acquired the right to select other land agreeably to the act of 1826, subject to the approval of the Secretary of the Interior."

And the fact that by the act of 1826 the State could select not less than 160 acres, the amount of a pre-emption right to be acquired by a settler, would seem to determine this question. The very fact that in selecting other lands she was permitted to select a portion as small as 160 acres would tend to show that the claim of 160 acres out of a section would not oust her from the remaining 480 acres. Were the defendants' claim correct, the State would never have occasion to select less than a whole section.

In regard to the portion of land claimed by the location of the "Geneva" and "Spring Hill" mines the facts do not find, and the pleadings do not show, that there was ever a house erected thereon prior to the survey. And the same is true of the piece of land enclosed in the boundaries of the "Keystone Mine" and "Keystone Field." And it is nowhere shown in the facts found, or even claimed, that any pre-emption right was ever perfected as to any portion of the section claimed by the plaintiff, or, indeed, on any other portion of section 36. Our grounds for this assertion are as follows. The only finding in the record on this point is as follows:

"Many of the buildings shown in the photograph marked 'Exhibit B,' hereinbefore mentioned, are dwelling-houses, and were standing and occupied as such dwelling-houses prior to the said Government survey of said township."
Rec., p. 22.

This may all be true, and still these buildings may not

be on either of the tracts claimed by the defendant. The survey of the private engineer was made in December, 1870, nine months after the Government survey was made in the field. It therefore does not follow, although said exhibit may show the existence of houses upon those tracts, that they were there at the time the Government survey was made. They might well have been erected between the time of the making of the Government survey and the making of the survey by mining engineers. In fact, the whole title of the defendants arises from mining locations, and the putting forward of an imperfected settlement as an ouster of the title of the State is an afterthought.

The grant being from a sovereign to a grantee, full legal title passed by the grant to the State from the moment of its publication, irrevokable by the United States by any further act of Congress, limitation, or condition.

This view of the law is sustained by an enlightened public policy which has always obtained in regard to such lands from the beginning of the Government by legislative, executive, and judicial construction of all like grants, without exception, which became operative prior to the commencement of this litigation, to wit, March 25, 1874.

Rec., p. 4.

THE POLICY OF THE GOVERNMENT IN REGARD TO SCHOOL AND OTHER GRANTS FOR PUBLIC USES.

This policy finds its first expression in the ordinance of May 20, 1785, (1 Laws of the U. S., 565; *Bioren and Duane ed.*,) entitled "An ordinance for ascertaining the mode of disposing of lands in the Western Territory."

The first paragraph of the ordinance is as follows:

"*Be it ordained by the United States in Congress assembled*, That the territory ceded by individual States to

the United States which has been purchased of the Indian inhabitants shall be disposed of in the following manner."

The ordinance then provides for the surveys of the land, makes dispositions of part, and, among other things, provides as follows:

"There shall be reserved the lot No. 16 of every township for the maintenance of public schools within the said township."

No limitation is made confining the school lands to non-mineral lands.

The ordinance of July 23, 1787, providing for the sale of a specified tract of land on the river Ohio, further provided that "the lot numbered 16 in each township, or fractional part of a township, to be given PERPETUALLY for the purposes contained in the said ordinance," referring to the ordinance of the 20th of May, 1785.

2d Laws U. S., p. 573, Bioren & Duane edition.

In the celebrated ordinance of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio in article 3 is the following provision:

"Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

U. S. Laws, vol. 1, B. & D. ed., p. 479.

By act of Congress, approved April 7, 1798, (1 Stats. at Large, p. 550,) the ordinance of 1787 was extended to the Mississippi Territory. The language of the 6th section is as follows:

"*And be it further enacted*, That from and after the establishment of said government the people of the aforesaid Terri-

tory shall be entitled to enjoy all and singular the rights, privileges, and advantages granted to the people of the territory of the United States northwest of the river Ohio in and by the aforesaid ordinance of the 13th of July, in the year 1787, in as full and ample a manner as the same are possessed and enjoyed by the people of the said last-mentioned territory."

By the act of the 30th of April, 1802, (2 S. at L., 175,) to enable the people of Ohio to form a constitution and State government, it is provided—

"That the section No. 16 in every township, and where such section has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools."

The general grants made for schools are shown in the following table:

In none of these grants is there any limitation of the school lands to the non-mineral lands, unless the last section of the last enabling act of Colorado makes such limitations. The act organizing the Territory of Colorado makes the grant without limitation, and so does the first enabling act. If it be claimed that the reservation of land for school purposes in the acts organizing the Territories is not an actual grant of the same, then the State of Mississippi has never received a general grant of school lands. The only grant of the kind received by her was in 1803 when organized as a Territory. (2 Stats. at Large, 234.) Her school lands have ever been treated by the legislative and judicial branches of the Government as vested in her by that act.

It will be observed that at first the grant of only one section, to wit, section 16, was made until 1848, when the policy of the Government became still more liberal in provision for schools, and thereafterwards a grant of two sections, the 16th and 36th, were made to States and Territories thereafterwards to be organized, commencing with Oregon.

9 Statutes at Large, 330.

It is claimed by the defendant (see his brief, p. 3) that "hitherto, *i. e.*, until the act of March 3, 1853, the uniform policy of the United States has been to reserve from sale and pre-emption all mineral lands, whether gold or silver, iron, or other metal, until the act of July 26, 1866, (14 Statutes at Large, p. 251,) which is the first departure from the policy so long cherished."

This certainly is a mistake. While the grants for the school funds and other public uses in every case were unlimited and unconditioned, and fortified in case other prior valid claims intervened upon the designated sections 16 and

36, that the State might take other lands in lieu thereof, no exception was made in any act of the *mineral* lands in grants for school purposes until the act of March 3, 1875, enabling the State of Colorado to be admitted into the Union; and then in section 15 of the act there was the distinct exception that "all mineral lands shall be excepted from the operation and grants of this act." So that the enabling act of Colorado was expressly qualified so as not to affect the mineral lands of that State. This is the last act of Congress passed upon this subject.

It is not true that in "other grants made through a long series of years the United States have reserved to themselves the mineral lands," because as early as the ordinance of 1785, as will be seen, in all other grants and sales one-third part of all gold, silver, lead, and copper mines are reserved to be sold and otherwise disposed of as Congress shall hereafter direct. And the form of deed to be given by the officer shows that it was not a reservation of the mineral land, but of one-third part of the gold, silver, lead, and copper mines within the same that was reserved. The language is as follows:

"Know ye, that for the consideration of —— dollars, we have granted, and hereby do grant and confirm, unto ——— ——— the township (or fractional part of the township; as the case may be) numbered ——— in the range ———, excepting therefrom and reserving one-third part of all gold, silver, lead, and copper mines within the same; and the lots No. 8, 11, 26, and 29, for future sale and disposition, and the lot No. 16 for the maintenance of public schools, to have and to hold, to said ——— ———, his heirs and assigns forever."

1 Laws B. and D., 566.

Salt springs and lead mines were reserved by subsequent laws. And this continued the policy of the Government—

the form of reservation of the one-third part of the gold, silver, lead, and copper mines for the term for which the Government interest might be leased having been provided by subsequent laws— until the act of July 11th, 1846, (9 Stats., p. 37,) which authorized the President to cause reserved lead mines and contiguous lands in the States of Illinois and Arkansas, and the Territories of Wisconsin and Iowa, belonging to the United States, to be exposed for sale in the same manner that other public lands are authorized by law to be sold, with exceptions as to price, and as to the leases and the manner of subdivisions provided for in the subsequent sections of said act.

Then comes the act of March 3, 1847, by which the President was authorized to sell all the mineral lands in the northern part of Michigan in the manner therein provided.

9 Stats., p. 146.

It will be seen, therefore, that the United States had sold all its lands, reserving one-third of the minerals to itself, and that afterwards it had caused to be sold all its rights in the minerals; so that prior to the act of 1853 the policy of the United States was to sell mineral lands as other lands were sold, and to relinquish all interest in the minerals of the land up to March 3, 1853.

Meantime gold and other rich minerals had been discovered in California. California had been admitted in 1850 as a State, without any grant from the United States before her admission of any lands for schools or other purposes.

The same policy was pursued by the Government in regard to "salt licks" and salt mines. In regard to them, while the Government reserved them from sale to individuals, they granted them *eo nomine*, with sufficient contiguous land to work them, to the several States.

2 Stats., p. 175, sec. 7, Ohio.

3 Stats., p. 547, Missouri.

Up to this time no reservations of mineral lands had been made in any grants to States for the general benefit of the inhabitants, although by the act of Congress of September 4, 1841, (5 S. at. L., 455,) each State had been granted 500,000 acres for internal improvements.

Nor was there any exception of mineral lands in the grants of swamp or overflow lands, although minerals might be, and are, frequently found in such lands, the same being granted to the State for a public purpose, to wit, the purpose of drainage and leveeage. The general swamp-land act was passed September 28, 1850, (9 Stats., p. 519,) its benefits being conferred upon every State in the Union, and California had been admitted into the Union nineteen days before.

Thus it will be seen that in all grants to a State, the policy of the Government has been never to reserve mineral lands, whether for State purposes, for internal improvements, or for drainage of land, or for educational purposes. But the policy of the Government from the beginning has been to retain an interest in the mineral lands subjected to public sale to the individual, or to the rights of pre-emption. Or, at least, when rights to mineral lands were sold, to obtain a double price for them. This was to prevent the absorption of valuable mines by speculators, either by purchase or pre-emption. But when California came in with its very extensive mineral land, the Government refused to allow any sale or pre-emption of her mineral lands.

A change in this policy first took place by the act of July 26, 1866, when locators of land for mining purposes were allowed to obtain patents for very restricted portions of mineral land.

LEGISLATIVE ACTION HAS ALWAYS CONSTRUED GRANTS FOR PUBLIC USES AS GIVING TITLE TO THE GRANTEE *in presenti* AND MOST BENEFICIALLY FOR HIM.

By the act of Congress, March 3, 1843, (5 Statutes, page 620, sec. 3) it was provided that every settler on section 16, reserved for the use of schools in the State of Mississippi, which was not surveyed at the time of said settlement, or should otherwise come within the provisions of the several pre-emption laws in force at the time of settlement, upon proof thereof, shall be entitled to enter at the minimum price another quarter-section or fractional quarter-section in the land district in which such school section may be, so as not to exceed 160 acres.

Thus it will be seen that Congress recognized that the grant of the school section passed the title to the State, although it had not been surveyed, and although no notice had come to the pre-emptors either through the provision of law or the land office. And instead of allowing the pre-emptor to remain on the 16th section, under a claim that he had a right there because he had located himself on public lands, the title not having passed by the grant, as is claimed in this case, Congress required him to take up land somewhere else and leave, because he was upon land that Congress had already granted, and of which the title had passed to the grantee. And this, too, in a case where the only grant was made to the State of Mississippi by words of reservation, while she was a Territory, before she was a State.

2 Stat., p. 233, sec. 12.

April 30, 1802, Congress granted the 16th section in each township in Ohio for the use of schools in the township.

2 Stats. at Large, 175.

In 1815 Congress granted to Anthony Shane "a tract of land to contain 320 acres lying on the river St. Mary's, at a place called Shane's Crossing, within the limits of the State of Ohio, but in a part thereof to which the Indian title has not yet been extinguished, the said tract to be located in a convenient form, and so as to comprehend the said Anthony Shane's improvements."

"SEC. 2. *And be it further enacted*, That as soon as the Indian title shall be extinguished the said three hundred and twenty acres shall be surveyed under the authority of the United States, and a patent therefor shall be granted to the said Anthony Shane; or, if not then living, to his children and legal representatives, to hold the same to them and to their heirs."

Approved February 24, 1815.

6 U. S. Stats. at Large, 149.

The survey of the land showed that it included a part of section 16, Dublin township, Mercer county, Ohio.

In 1842 an act was passed granting to said township land scrip, in *value* equal to the value of the school lands covered by the Shane grant and by a grant to Louis Godfrey, with the following proviso:

"*Provided, however*, That before the issue and delivery of said scrip the inhabitants of said township, at a legal meeting called for that purpose, shall vote to accept of the same in full satisfaction of their right and claim to the lands so granted, and in full compensation therefor, and shall authorize and cause to be executed to the United States, and filed with the Commissioner of the General Land Office, and to his approval, a good and sufficient deed of quit claim, in release, in law and equity, of all claim, right, title, and interest in and to all those parts of said section sixteen in said township which are included in and conveyed by the grants aforesaid to said Anthony Shane and Louis Godfrey: *And provided further*, That if so or-

dered by said inhabitants at such meeting, the execution and acknowledgment of such deed of conveyance by a majority of said trustees, according to the laws of Ohio, shall be deemed and held a sufficient execution and acknowledgment thereof by said inhabitants."

6 Stat. at Large, 862.

Congress here gives the construction the plaintiff in error claims in the most stringent form.

It will be observed that the school-land grant was in 1802, before the possessory title of the Indians had been extinguished. Nothing was done to perfect the title, other than the simple grant, until 1815, when Congress granted to Anthony Shane a piece of land by metes and bounds to cover his improvements. But that land also covered the school section. Congress, recognizing the title of the section to be in the township, directed, not that the township should take some other lands in lieu thereof, but regarding the increased value of the land to which they had granted title, directed that a commission should value that land at the then present value, full thirty years after the grant of title; and then caused the full value of the lands to be paid for in land-scrip; and then having paid for the land, Congress required the township to execute a deed to the United States of that land, so as to reconvey that title which the township had received from the United States in 1802.

6 Stats., p. 862.

Could a more direct recognition that the title passed *in presenti* to the township be conceived of, especially when neither the township was unorganized nor the State did not exist at the time of the grant, the grant being in the enabling act to the State of Ohio to come into existence? How much stronger is the case at bar, where California received the grant of the *locus de quo*, having then been in existence as a State over two years.

This Congressional legislative construction was made when Nathan Clifford, Wm. Pitt Fessenden, John Quincy Adams, Caleb Cushing, Rufus Choate, Millard Filmore, William L. Dayton, James Buchanan, William C. Rives, John C. Calhoun, Henry Clay, Thomas Benton, John J. Crittenden, and Jacob M. Howard were members of the House and Senate; and Daniel Webster was Secretary of State, and Walter Forward, who had the execution of the act in question, and required the deed, was Secretary of the Treasury. "There were giants in those days"—LAWYERS in Congress, not merely *members of the bar.*

Want of space and time make it inconvenient to follow this with all the citations which might be made of similar acts of Congress.

SUCH, ALSO, HAS BEEN THE CONSTRUCTION OF THE EXECUTIVE DEPARTMENT.

We cite a single opinion, (9 Op. Atty.-Gen., 254:)

ATTORNEY-GENERAL'S OFFICE, *Nov.* 10, 1858.

SIR: By the act of September 28, 1850, Congress granted to the State of Arkansas all the swamp and overflowed land, rendered unfit for cultivation thereby, within her limits for certain purposes mentioned in the act. On the 3d of October, 1856, the surveyor-general made a report, which was filed in the General Land Office, designating the overflowed lands which had been selected by the State under the grant. On the 9th of February, 1853, Congress made another to the States of Arkansas and Missouri to aid in the construction of a railroad, and under this grant a part of the lands previously granted to the State of Arkansas, under the denomination of swamp lands, was included, and is now claimed for the use of the railroad. The question upon which you ask my advice requires a comparison of the two laws and the acts done under them, so as to ascertain which of these is the better title.

Does the State take it under the first grant, or was that grant so imperfect that the subsequent disposition of it by Congress passes the right to the later grantee?

Where there is a conflict between two titles derived from the same source, either of which would be good if the other were out of the way, the older one must always prevail, *prior in tempore, potior in jure.*

The difficulty, therefore, is solved if the mere grant, as you call it, gave the State a right to the land the day of its date. That it did so, there is no doubt. In an opinion which I sent you on the 7th of June, 1857, concerning one of the same laws now under consideration, I said that a grant by Congress does of itself, *proprio vigore*, pass to the grantee all the estate which the United States had in the subject-matter of the grant, except what is *expressly excepted.* I refer you to that opinion for the reasons and authorities upon which the principle is grounded. It is not necessary that the patent should issue before the title vests in the State under the act of 1850.

The act of Congress was itself a present grant, wanting nothing but a definition of boundaries to make it perfect, and to attain that object the Secretary of the Interior was directed to make out an accurate list and plan of the lands and cause a patent to be issued therefor.

But when a party is authorized to demand a patent for land his title is vested as much as if he had the patent itself, which is but evidence of his title.

The authority given to the State legislature to dispose of the lands upon the patent does not make the grantee less the exclusive owner of them than she would be if those words were omitted. The object of that clause undoubtedly was to prevent the legislature of the State from a premature interference with the lands before they were so designated as to preclude mistake and confusion.

The subsequent grant by Congress to the State for the use of the railroad could not have been intended to take away from the State the rights previously vested in her for other purposes. We are never to impute such intentions to the legislative department when any other construction can be given to the words of a statute.

Even if we could suppose that to be the meaning of

Congress in this case it would avail nothing to the latter grantee, since, in all cases of a conveyance, a latter grant must yield to an earlier. It has often happened that public grants, by mistake, have been so described in general words that when they come to be located they are found to lie afoul of each other. I believe it has never been thought that where this happens they are not to be treated like inconsistent deeds made by private persons.

There are cases in which grants are made under descriptions so vague and indefinite that neither the grantee nor any other person can tell their location or boundaries until the grantee does some act which locates and defines them. In such case, if another right which is strictly defined intervenes, the first grantee may lose what he would have been entitled to, if his own grant had been descriptive and definite. But that principle does not apply here, because the general description of swamp and overflowed lands, within the limits of Arkansas, is definite enough for purposes of notice.

Besides, the grant for the railroad was originally much more indefinite than the other, requiring the location of the road to be made before the locality of the lands could be known to all. The State proceeded to make her selections and to fix the location of the lands definitely before the railroad did any such thing with its grant. The State, therefore, has the oldest and most definite title, and its lands were accurately located and their boundaries particularly defined agreeably to the act of Congress before the same thing was done by the other claimants. The oldest title is the most definite, and the first location will surely give her priority and preference over another grantee subsequent in title, less definite in the terms of the grant, and later in location.

I am, very respectfully, &c.,

J. S. BLACK.

Hon. JACOB THOMPSON,
Sec'y of the Interior, Washington, D. C.

THE JUDICIAL CONSTRUCTION OF LIKE GRANTS HAS BEEN UNSWERVINGLY IN THE SAME DIRECTION IN EVERY WELL-CONSIDERED CASE.

That a grant of section 36 was made to California by the most apt and direct words of concession—"shall be and hereby is granted"—is not denied, operating *in presenti;* because, as a State, she was *in esse* to take the grant, and did accept it.

The defendants claim under a subsequent grant.

A government is never presumed to grant the same land twice.

U. S. *v.* Arredondo, 6 Pet., 738, and cases there cited.

"If land is granted by a State its legislative power is incompetent to annul the grant, and to grant the land to another. Such law is void."

Ibid.

It will be observed that this grant was made by way of exception, excepting, out of the public lands, certain sections, which "are hereby granted."

In order to ascertain what is granted, we must first ascertain what is included in the exception, for whatever is included in the exception is excluded from the grant according to the maxim laid down in Co. Lit., 47*a*:

"*Si quis rem dat, et partem retinet, illa pars quam retinet semper cum eo est et semper fuit.*"

Ibid., 741.

Here the grant itself is the exception, and excepts from the public lands, never to be returned to them, so much land, to wit, the 16th and 36th sections.

In the case of Beecher *v.* Wetherby, (5 Otto, 524,) Mr.

Justice Field quotes from Cooper *v.* Roberts, (18 H., 173,) as follows:

"We agree that until the survey of the township and the designation of the specific section the right of the State rests in compact, binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty the compact has an object upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title. The *jus ad rem*, by the performance of that executive act, becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others."

And says:

"In this case the township, embracing the land in question, was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. With this identification of the section, the title of the State, upon the authority cited, became complete, *unless there had been a sale or other disposition of the property by the United States* PREVIOUS *to the* COMPACT *with the State.* No subsequent sale or other disposition, as already stated, could defeat the appropriation."

In the case of Rutherford *v.* Green's Heirs, (2 Wheat., p. 202,) Chief-Justice Marshall says:

"That a general permission to enter lands within a given tract of country must of necessity be limited to lands not previously appropriated." * * * "The proposition is believed to be perfectly correct, that the act of 1783, which opened the Land Office, must be construed as offering for sale those lands only which were then liable to appropriation, not those which had before been individually appropriated. Whatever the legislative power may be, its acts

ought never to be so construed as to subvert the rights of property, unless its intention so to do shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object. No general terms intended for property to which may be fairly applicable, and not particularly applied by the legislature; *no silent, implied, and constructive appeals ought ever to be so understood as to divest a vested right.*" * * *

In the case of Frémont *v.* The United States, (17 How., 559,) Chief-Justice Taney, discussing the case of Rutherford *v.* Green's Heirs, uses the following language:

"It recognizes as a general principle of justice and municipal law that such a grant for a certain quantity of land by the Government, to be afterwards surveyed and laid off within a certain Territory, vests in the grantee a present and immediate interest."

We also cite as to the effect of a grant *in presenti* by the words "are hereby granted."

Lessieur *v.* Price, 12 Howard, 72.

Schulenberg *v.* Harriman, 21 Wallace, 44.

In this case the location of the land was not even left to public officers, but was wholly left to the option of the location of the railroad.

The same point was decided in stronger terms in Leavenworth R.R. *v.* U. S., (2 Otto, 745,) where a grant was made to aid in the construction of a railroad of alternate sections designated by odd numbers. It was held that that grant vested a present title in the State, although the survey of the land and location of the road were necessary to give precision to it.

We might continue the citation of cases innumerable, upon the same point, in State courts; but so doing would

be a show of learning only, but of no profit to the discussion.

But the decisions of the State of California stand upon a different footing, and should be brought especially to the attention of the court, that the rule may be applied, that the decisions of State tribunals are to be followed upon questions regarding real property within the States.

In the case of Doll *v.* Meador, (16 Cal. R., 275, p. 315,) Mr. Justice Field, then upon the supreme bench of that State, in construing the granting words in concessions to States, says:

"The words of the first clause of this section were held by the Supreme Court of the United States in Foley *v.* Harrison (15 Howard, 447) inoperative to pass the fee from the General Government. 'The words of the act of 1841,' said the court, 'are that there shall be granted to each State,' not that there is hereby granted. The words import that a grant shall be made in future. The last clause of the act with reference to the new States is materially different. Its words are, 'there shall be and *hereby is granted*,' words which operate to vest the specific quantity in each new State immediately upon its admission into the Union. Under it, upon her admission, California acquired a present and vested interest in the quantity designated, with a right to select and locate the same, in such manner as her legislature might direct, out of any of the public lands of the United States, except such as were or might be reserved from sale by any law of Congress or the proclamation of the President. It is to be observed that, with reference to the States referred to in the first section of the act, the selections and locations are to be made after the lands of the United States in those States, respectively, have been surveyed according to the existing laws. But with reference to the new States, the *time* of the selection and location is not designated."

This decision has been followed in every case since in

California where the point has been raised, as well as in the case of the 500,000-acre grant, and the swamp land grant, as in case of school grants.

And we close this part of the discussion to show that, after a grant is once made, nothing can be done by the legislature to change, alter, limit, or condition it, by citing—

Fletcher *v.* Peck, 6 Cranch, 87.
Terrett *v.* Taylor, 9 Cranch, 43.
Pawlett *v.* Clark, 9 Cranch, 292.
Rice *v.* Railroad Co., 1 Black, 358.
Kissell *v.* St. Louis Public Schools, 18 H., 19.

Such, and so sustained, is our title. A grant to the State of California excepted out of ALL the public lands of California the title attaching at once thereto, and only to be disturbed by the happening of one of three contingencies, on which it is made dependent by the 7th section of the act:

First. When any settlement by the erection of a dwelling-house or the cultivation of any portion of the land shall be made before the same shall be surveyed.

Second. Where such section may be reserved for public uses.

Third. Where they may have been taken by private claims.

Neither of these contingencies have happened in this case or can be fairly claimed to have happened.

There has been no reservation for public use of this section. No private land claim, within the well understood meaning of that phrase, attached to it; nor are these two exceptions claimed in the defendants' brief.

They do make claim, however, that it is excepted out because there have been dwelling-houses upon, and cultivation of, a part of the land of that section. The defend-

ants do not claim, however, that such settlements by dwelling-houses or cultivation are upon the lands patented to them, or that those lands were ever claimed by any person as settled upon from whom they derived title.

It is an agreed fact that no settlement under any pre-emption claim has ever been made or attempted to be made and perfected upon any portion of this section.

Indeed, the defendants agree that no such settlement by the laws of the United States either were or could have been made upon the land patented to them, because both plaintiff and defendant admit and claim that the *locus de quo* is a part of the mining lands of the United States, which are inhibited from settlement by the 6th section and the latter clause of the 7th section, which provides: "Nor shall any person obtain the benefits of this act a by settlement or location on mineral lands."

Now, settlement is a well-understood and defined word when used in regard to public lands. It means the occupation of lands for the purpose of obtaining a pre-emption claim thereto.

The fact is not found, nor does it exist, that any settlement in this sense has ever been made upon the land, or continued, or that any man has ever made any claim to any portion of this land before the proper land office or elsewhere upon this ground.

Now, can it be sustained, as it would seem to be put forth in the defendant's brief, that the construction of this act should be that the mere settlement for an hour upon the land, or a day, week, month, or year, or series of years, ousts the State's title thereto, unless such settlement duly ripened into a pre-emption right? That point is expressly decided in the Water and Mining Company *vs.* Bugbey, (6 Otto, 165.)

It is also decided in the case of Sherman *vs.* Buick, (3 Otto, 209,) where the following language is used:

"These things (settlement and improvement under the law) being found to exist when the survey ascertained their location on a school section, the claim of the State to that particular piece of land was at an end; and it being shown in the proper mode to the proper officer of the United States, the right of the State to that land was gone, and in lieu of it she had acquired the right to select other land, agreeably to the act of 1826."

But there must be a settlement and improvement under the law.

This point was decided in the Water and Mining Company *v.* Bugbey, (6 Otto, 165,) wherein the Chief-Justice uses the following language:

"As against all the world, upon the completion of the surveys, except the pre-emption settler, the title of the United States passed to the State; and if the settler failed to assert his claim, or make it good, the rights of the State became absolute."

Further:

"The settler, however, was under no obligation to assert his claim, and he having abandoned it, the title of the State became absolute—as of May 19, 1866, when the surveys were completed."

The court says:

"The case stands, therefore, as if at that date"—(to wit, May 19, 1866, being the day on which the case shows the survey of the lands in controversy was completed in the field, but the plats not deposited in the district land office)—"the United States had parted with all interest in and control over the property."

No argument can add to the decision on that point.

The exceptions found in the act giving the grant to the State of the section are thus disposed of.

THE TITLE OF THE DEFENDANT.

The defendants, not being pre-emptors claiming title thereby, set up title to the land as locators of certain mining claims upon it, and say that they had a patent for two mineral locations, the Spring Hill and Geneva, bounded and described as appears on the plat in the record, and say they are in possession of another, the "Keystone," and the Keystone Field. Upon those claims they aver that the State is dispossessed of all title to any portion of the land within section 36.

Can this position be maintained?

It is asserted that those under whom the defendants claim, both before and after the act of 1853, located certain mining claims upon the portion of this land patented by the State to plaintiffs, and that they have occupied their location ever since.

Location has a well-known significance, and is everywhere used in the same meaning in relation to mineral lands, whether in legal phrase or common parlance. It means staking out or claiming certain mineral lodes, veins, or mineral deposits, which when staked out and claimed are called locations. The defendants themselves used the word in this sense, and say their claim-grantors located on unsurveyed mineral lands.

Brief, p. 2, par. 4.

Location upon this land is inhibited by the last clause of the 7th section of the act already cited, which with the same positiveness inhibits a location by any person upon these mineral lands which shall entitle him to any benefits under this act, as it does a settlement upon

the same. The defendants admit that they cannot obtain any benefit of this act under the settlement, for they have made none. We say they cannot obtain any benefit of this act by location, although they have made one, because as to that location they were inhibited from any benefit under this act, and the benefit of the act which they claim is that their location shall deprive the State of California of her title by bringing section 36 under the exception of the 7th section, which takes the section out of the grant.

The defendants therefore claim that they obtained certain rights in this land by location of a mine and cultivation of a part of it, to wit, the cultivation of a piece called "Keystone Field;" and that the cultivation of it in connection with their location takes away title of the State in the whole of section 36 by virtue of section 7, of which they claim the benefit. The cultivation as a pre-emption claim of the settlement was prohibited, being on mining land. It is expressly prohibited that any benefit shall be derived either by locator or settler. Then, so far as this act is concerned, their location and cultivation might as well never have been made. They are simply acts of trespass upon lands which it is declared by law can give no right; and, being such acts of trespass upon unsurveyed and wild lands, cannot ripen into a disseisin against the true owner.

The argument of the defendants is that the whole policy of Government in regard to the State of California is that the Government shall lend all its influence to bend all the energies of the inhabitants to digging out the precious metals, and that every other duty of the Government is made subservient to this purpose.

As we have seen, the policy of the Government from its foundation was to make each State a Commonwealth, stable and capable of sustaining good government in itself

by education and moral instruction, and funds were created by the bounty of the Government in every State for this purpose.

Can the court, without apt and direct provisions of legislation, showing some change of policy to have been intended to be made by the Government, construe a direct and positive grant so as to take away from the State the most valuable part of the fund granted for what always has been deemed, and we trust still is deemed, the most important elements in the preservation of the foundations of governments in the education and morality of its people. Such provisions, or anything hinting such a change of policy, will be searched for as yet in vain through the statute-books of the nation, and the patriot will devoutly pray that such legislation may never be found.

THE PLEA OF THE STATUTE OF LIMITATIONS.

In the sixth proposition of defendant's brief it is claimed that if title passed to the State of California by the act of March 3, 1853, then the defendants, or those under whom they claim, having been in possession more than the time necessary to take away the right of action by the State, is an answer to the writ of ejectment.

This defence evidently proceeds upon a misunderstanding of the plaintiff's claim, which may be properly restated thus:

By the act of March 3, 1853, title to section 36 passed to the State of California, so that, upon the principle before stated, the United States could not grant it to any one else or take it away from the State, subject to be defeated in so far as it might interfere with the pre-emption settler who had perfected his title, or who was in the act of so doing within the time prescribed by law, or by private claim to

the land or by reservation for a public use, neither of which exceptions had taken place. But that title meanwhile, as against the Government and everybody claiming under them, was not in condition to be asserted until the survey established the place of the land to which it attached on the earth's surface. Up to that time neither the State of California nor anybody claiming under it could bring any suit to protect the land from intrusion. The survey which gave that right was in 1870, and this action was brought in 1874, clearly within the time of any statute of limitations.

No possession by the defendant or its vendors adverse to the State of California appears at any time before the 6th day of January, 1871, when the defendant applied for a patent from the United States. Before that date it is only found that "the original locators of each of said claims and their grantees have held undisturbed possession thereof from the date of such location until the present time, and the possessory title to each said claim acquired by said locations respectively, and by such possession and working of said mines was vested in defendant at the time of its application for patents for said mines, * * *unless it shall be held that the State of California acquired title to said section* 36 *by grant from the United States.*" By the statute of California, as well as by the common law, it is presumed that the holder of the legal title has been possessed of the property within the time prescribed by the statute of limitations, and that the occupation of the property by any other person has been under and in subordination to the legal title until it is shown to have been adverse to the legal title during an uninterrupted period equal to the time prescribed by the statute of limitations.

Code of Civil Procedure of Cal., sec. 321, (2 Hittell, 951.)

To constitute an adverse possession it must be under a claim of title *exclusive of any other right;* and when not founded on a written instrument, judgment, or decree, only the land actually occupied is deemed to have been held adversely.

Cal. Code, Civil Pro., sections 322–325.
Figg *v.* Mayo, 39 Cal., 267.
Farish *v.* Coon, 40 Cal., 33.

This last case applies to the statute pleaded in the case at bar.

The statute runs only in favor of parties claiming title adversely *to all the world*, and not in favor of those who assert the title to be in others.

McCracken *v.* City of San Francisco, 16 Cal., 635.

In the case at bar it appears only that the locators of the mining claims and their grantees "held undisturbed possession thereof," which must be presumed to have been under, and in subordination to, the legal title. The whole case shows that they and the defendant asserted the title to be in another, viz., the United States, and that neither claimed the title until 1873, nor any interest or right of possession until the passage of the act of Congress of July, 1866—less than eight years before the commencement of this action. Again, it does not appear that the defendant is a grantee of said locators or of their grantees, or that there was any privity between the defendant and said locators or their grantees, although it is said that such possessory title as they acquired by said location was vested in the defendant at the time it applied for patents, (January 6, 1871,) *unless the State of California had acquired title by grant from the United States.* Besides being more a matter of law than fact, this shows that defendant did not claim title adversely to the title of California, but only on

the condition that California never acquired the title; yet the plea of the statute of limitations goes on the assumption that California had the title, and lost it by the adverse claim and possession of the defendant.

THE SUBJECT OF THE GRANT EXISTED AT THE TIME OF THE GRANT.

It is claimed by defendant's counsel that until a survey the thing granted by the act of March 3, 1853, had no existence. This transparent fallacy rests upon the assumption that the Government granted only an abstract attribute of the land, viz., the superficial dimensions thereof, without granting the land. The word "section" is simply descriptive of the land granted, and must be taken in the sense in which it was used in connection with the law prescribing the mode of surveying the land and numbering the lots surveyed at the date of the grant. The grant was of the *land;* not merely of an abstract attribute of the land, by means of which the land was described. Nor is it true, as contended by counsel, that the survey *creates* the boundary lines called for in the grant. The survey merely identifies and ascertains the locations of those lines, and marks them so that they may be afterwards easily found and traced.

It is said that plaintiff only paid $400 for the demanded premises. That, however, is a matter between plaintiff and the State of California. If it is to have any influence in this case it may be proper to call attention to the fact that, for all that part of said premises which are of any value the defendant paid only $275, and it is admitted that from March, 1872, until March, 1874, the defendant extracted therefrom $288,000. How much defendant realized during the other thirteen years, which it claims to have occupied before the commencement of this suit, and the six

years since the commencement of this suit, does not appear. Whatever it may have been, plaintiff can have no remedy for the recovery of it, except for three years immediately preceding a judgment for plaintiff in this action, the limitation upon an action for trespass for mesne profits in California being three years.

GRANT OF SCHOOL LANDS NOT INCONSISTENT WITH THE OTHER GRANTS TO THE STATE IN THE SAME ACT.

Counsel for defendant makes the point that the grant of the 16th and 36th sections on mineral lands was inconsistent with the prohibition of pre-emption settlements, and the selection of 72 sections for a seminary of learning, and 10 sections for public buildings thereon.

To this it may be answered—

1st. That the language of the several grants and exceptions being explicit, neither the plaintiff nor this court is responsible for the alleged inconsistency.

2d. But there is no such inconsistency.

Pre-emption rights had always been restricted to agricultural lands. The donation of seventy-two sections for a seminary of learning and ten sections for public buildings were to be *selected* by the State, and the pre-empted lands were to be *selected* by the settlers, and if permitted to be located on the mineral lands, all the valuable mines might have been monopolized by either class. Eighty-two sections might have been so located as to cover more than one thousand of the best mines. But the lands donated for the support of schools were *selected by the Government*, and equally distributed over the State, in accordance with the plan adopted nearly a century before, and which has been practised ever since; and whether the sections, 16 and 36, so selected by the donor, turned out to be valuable or entirely worthless, the State was bound by

the selection. In this view of the matter, which is the true one, the alleged inconsistency disappears entirely.

THE WHOLE CASE IS RESOLVED INTO THIS:

The United States granted to a State certain lands for school purposes by express words of concession. Can the grantor, although the sovereign, or anybody claiming by, through, or under him, take away the title to the land granted, and obtain to himself an adverse title, because that land was more valuable than some other pieces of land?

This is the whole claim of the defendants in this case.

The grantor did not expect the State to cultivate it, but sell it for the largest price it could get, to make a school fund in trust for a given township; the more valuable, the larger the fund. The law is not limited to agricultural land. If the school sections fell on the side of a mountain, where land was little desirable for agricultural purposes, still the State must take them and become the owner. But the claim is that if the side of the mountain was more valuable for other purposes—*i. e.*, for timber, or for minerals, or for coal, or for a sulphur or medicinal spring—then it does not pass under the grant.

When the survey determines the title against it for such reason, the State of California cannot, as in the case of grants to some of the older States, take in lieu thereof "contiguous land," but a quarter of a century after the grant must be held to take other lands, after all the most valuable land in the State has been taken up.

Thus, on the theory of the defendants, the school fund might be entirely frittered away by a single settler upon one corner of one of its sections of good agricultural lands, or a single locator upon a corner of one of the sections of the mineral lands, or a single locator upon a corner of one of the sections of the timber lands, provided he built a house

there. And thus, while Congress had given one-eighteenth of all the lands in California to the State for its schools, yet on the claim of the defendants all that is valuable in that grant may be taken away from the State by its citizens, and the State remitted to take its lieu-lands in those unfit for any purpose and valueless.

This is the claim of these defendants, made upon some supposed public policy in favor of trespassers and speculators who are claiming to prey to the extent of millions upon the fund dedicated by our ancestors and guarded by every act of Congress to sustain education, religion, and morality, as necessary to good government and the welfare of mankind.

BENJ. F. BUTLER,
O. D. BARRETT.

APPENDIX.

California Statutes referred to on pp. 35 and 36 *supra :*

2 *Hittell Code of Cal., p.* 951, *Secs.* 321, 322, 323, 324, *and* 325.

"SEC. 321. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under, and in subordination to, the legal title, unless it appear that the property has been held and possessed adversely to such legal title for five years before the commencement of the action.

"SEC. 322. When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely, except that, when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

"SEC. 323. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment, or decree, land is deemed to have been possessed and occupied in the following cases:

"1. Where it has been usually cultivated or improved.

"2. Where it has been protected by a substantial inclosure.

"3. Where, although not inclosed, it has been used for

the supply of fuel or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant.

"4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been lett not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

"SEC. 324. Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

"SEC. 325. For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

"1. Where it has been protected by a substantial inclosure.

"2. Where it has been usually cultivated or improved."

SUPREME COURT U. S.
FILED
OCT. 12 1880
JAMES H. McKENNEY, Clerk

No. 637.

SUPREME COURT OF THE UNITED STATES.

IVANHOE MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE KEYSTONE CONSOLIDATED MINING COMPANY, DEFENDANT IN ERROR.

BRIEF OF S. M. WILSON, ON BEHALF OF DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

No. 637.

THE IVANHOE MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE KEYSTONE CONSOLIDATED MINING COMPANY, DEFENDANT IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Brief of S. M. WILSON, of Counsel for Defendant in error.

STATEMENT.

This is an action of ejectment for a tract of land (situated in Amador county, California,) being the eastern half of Section 36, Town 7, N. R. 10 East Mt. Diablo Meridian, and for the gold mineral extracted therefrom, valued at $288,000.

The portions in controversy are mineral lands within the meaning of the Acts of Congress on the subject, (a point which is not disputed) and have been in the possession of the defendant and its grantors as mineral lands for a number of years—part since 1851, part since 1853, and part since 1863. These several mining claims were located, occupied and improved from the above dates respectively to this time by the defendant, and its grantors according to the local customs and rules of the miners of the district and of the regulations prescribed by law. By due proceedings regularly taken, patents were issued for these mines in the year 1873, by the United States Government to the defendant, and it now defends under the same.

The plaintiff claims that these were School lands belonging to the State of California, and relies upon a patent from the State, issued Oct. 3d, 1873, to one Henry Casey. This patent is for the eastern half of Section 36, on which is situated all the mines of the defendant as well as others of great value, and also the town of Amador. Mr. Casey paid for the 320 acres the sum of $400. (See Stats. of Cal. 1867–8, p. p. 521–2.)

The township in which the property is situated was not surveyed in the field until March, 1870; the official plat was not approved until September, 1870; and was not filed in the proper land office until October 7th, 1870. (Fol. 68, Record.)

There were no disputed questions of fact, but the case is presented upon an agreed statement, adopted by the Court below as its finding, leaving only the question of law remaining—in whom was the legal title at the time of the commencement of this action, March 25th, 1874?

The controversy here extends over ten years and was vigorously maintained in the U. S. Land Office when the defendant applied for its patents. The Register and Receiver, as between Casey and the defendant, decided in favor of the latter; the Commissioner of the General Land Office and the Secretary of the Interior, have respectively decided also in the defendant's favor. (Folios 66–67 Record.) Copies of their respective opinions will be presented to the Court. Having been defeated in the Land Departments of the Government, the plaintiff has transferred the controversy to the Courts, commencing his case in the District Court of the Fifteenth Judicial District of the State of California, whence it was removed to the Circuit Court of the United States.

The prominent facts are as follows, viz:

1st. The property in controversy is *mineral land.*

2d. The defendant and its grantors whilst the same was *unsurveyed,* located their mines and occupied and improved the same according to the customs and rules of miners.

3d. Upon the United States Survey in 1870, it was ascertained that these mines were upon the *Eastern half of Section* 36.

4th. *After the survey* plaintiff's grantor took proceedings in the State Land Office to obtain the *State's patent,* and obtained it in 1873.

5th. The defendant obtained the United States patent for the mines, under the Acts of Congress, providing for the disposition of mineral lands.

ARGUMENT.

If the State had title it passed to Casey: if the State did not have title it passed to defendant. The plaintiffs in error relies upon proposition so much discussed and controverted, that the Act of Congress of the 3d of March, 1853, (10 U. S. Stats. p. 246,) was a grant *in presenti,* to the State, of Section 36, vesting title immediately, and that the subsequent survey merely ascertained its exact location, and gave it place; and that upon survey, the title related back and dated cotemporaneously with the Act of Congress. And this is said to apply as well to the mineral lands as to agricultural lands. Upon these premises it is argued, that the Acts of Congress of the 26th July, 1866, (14 U. S. Stat. 251,) and the Acts of July 9th, 1870, and 10th May, 1872, (16 U. S. Stat. 217, and 17 U. S. Stat. 91,) under which

the defendant obtained its patent from the United States for its mines, could not and did not divest the State of its vested rights and title. Hence the conclusion is asserted that the patent of the State conveyed the true title to the plaintiff.

These propositions are controverted by defendant in error, so far as the mineral lands are concerned, and especially as to those upon which mines were discovered and worked prior to the survey.

I.

Did the Act of Congress of March 3d, 1853, (10 U. S. Stats. p. 244,) grant to the State of California, Sections 16 and 36, where they were mineral lands?

It is respectfully submitted that the contrary intention is manifest from the Act itself, as well as from the previous legislation of Congress. Before and at the time of the passage of the Act of Congress referred to, the world was ablaze with the fame of California, as a mineral region. She had received the name of the "Golden State." Mining was the great and predominating interest in the State. Hitherto the uniform policy of the United States had been to reserve from sale and pre-emption the mineral lands whether gold, silver, iron or other metal. The Act of July 26th, 1866, (14 U. S. Stat. 251,) was the first departure from this policy so long cherished.

The Act of 3d March, 1853, (10 U. S. Stat. 244,) under which the plaintiff claims showed a determination on the part of Congress to adhere to the old line of policy. That Act was entitled "An Act to provide for the Survey of the Public Lands in California, and the granting of pre-emption rights therein, and for other purposes." The first five sections are devoted to the matters of survey and the officers to accomplish them. The proviso of Section 3, forbids any survey of *mineral lands* other than of township lines. There were to be no *sections* of mineral ~~lines~~. The first authority to survey these into sections is to be found in the Act of July 9th, 1870, (16 U. S. Stat. 217, Sect. 16). In construing therefore the Act of March 6th, 1853, we must do so in view of the fact that that statute, itself forbids the surveying of mineral lands into sections. It follows logically, that when Sections 16 and 36 are referred to, they necessarily imply such sections in lands other than mineral lands, for in mineral lands there were to be no such subdivisions. Sections 7, 8, 12 and 13, of the Act show the solicitude and care of the Government for its mineral lands. In the grant of Sections 16 and 36 for school purposes, (contained in Sec. 6 of the Act,) it was not necessary to except mineral lands, for a previous part of the Act (Sec. 3, *proviso*), had prescribed that in mineral lands there should be no such sections, and thus they were already excepted from the grant. No pre-emptioner could obtain any mineral lands, under that Act. And when towns and town sites came to be provided for (Sec. 8,) exceptions were made as to "such towns as are located on or near mineral lands, the inhabitants of which shall have the right of occupation and cultivation only until such time as Congress shall dispose of the same." So when in Section 12 a grant, of two entire townships or seventy-two sections to be selected, was made

to California, for a seminary of learning, it was expressly provided that no mineral lands should be selected. And when in Section 13, ten entire sections, to be selected, were granted to California, for the purpose of erecting public buildings, the same prohibition to the selections of mineral lands is found. Why should such care be taken to prevent the State from selecting mineral lands for all these other purposes, (one being for the purpose of education) and yet a general grant be made throughout the State of the 16th and 36th sections though they be mineral lands? Why deny to the hardy pioneer and settler, a pre-emption on these sections, and yet give them to the State? It is expressly provided in some instances that the mineral lands shall be reserved for future disposition by Congress, and as to mineral lands generally they were necessarily left to future legislation if this Act did not dispose of them. It could not dispose of Sections 16 and 36 on mineral lands, because it carefully provided against their *creation*, and thus they remain intact with the other mineral lands in the State all unsurveyed into sections, until Congress should determine upon their ultimate disposition.

If mineral lands pass to the State when Sections 16 and 36 cover them, then some very curious and absurd results follow, and we can legitimately argue from the *reductio ad absurdum* against such a construction of the Statute. Let us assume that Sections 16 and 36 though on mineral lands pass to the State. They cannot by the very letter of the Act of Congress pass to a pre-emptioner. If therefore the settler on unsurveyed land turns out to be on Sections 16 and 36, he confessedly takes it away from the State, if it be agricultural lands; but if it be mineral land the State takes it from the settler. But when the State comes to select her lands donated for seminary and for public buildings under Sections 12 and 13, she is expressly forbidden to select mineral land. The fair and sensible rules of construction referred to in the case of *Heydenfeldt* vs. *Daney Gold etc. Co.* 3 Otto, p. 634, would never lead to such irrational results, or inconsistency.

The mineral lands had always, as already stated, been reserved from sale or other disposition under the general laws, and "the words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

Newhall vs. *Sanger*, 2 Otto, 763.
Leavenworth etc. R. R. Co. vs. *U. S.* Ib. 733.
U. S. vs. *Gear*, 3 How. U. S. R. 120.

The principle of these cases fully sustains the proposition that as a matter of construction and manifest implication, the mineral lands were excluded from the entire operation of the Act of 1853, and reserved for future disposition by Congress.

The following United States Statutes, show also, that the mineral lands had always, down to July, 1866, been reserved by the Government and kept with great solicitude for future disposition, and that then for the first time their disposition was provided for.

12 U. S. Stat. p. 410, Soctions 7 and 10.
13 Ib. p. 567, Joint Res. No. 10.

14 Ib. p. 43, Ch. LXXIII.—
Ib. pp. 66–67, Ch. CXXVII. Sec. 1;
Ib. p. 218, Ch. CCXIX. Sec. 1;
Ib. pp. 541–2, Ch. CLXXVII;
15 Ib. p. 67, Ch. LIII;
Ib. p. 67, Ch. LV. Secs. 2 and 3.
16 Ib. pp. 217–218, approved July 9th, 1870.

Section 16 of the last named Act provides for the first time for the survey of mineral lands into subdivisions less than townships.

See also,

17 U. S. Stat. p. 91, Ch. CLII;
18 Ib. p. 476, Ch. 139, Sec. 15;
19 Ib. p. 268, Ch. 81, Sec 4.

The rulings of the Land Department at Washington, have always been that Sections 16 and 36 where they fall on mineral lands, do not pass to the State, under the grant for school purposes.

Keystone Case—Copps U. S. Min. Dec. pp. 105, *et seq.*
Delaney et al. vs. *Thomas*, 2 Copps Land Owner, p. 50.
Poly & Thomas vs. *State of Cal.*
Weeks on Min. Lands, pp. 64, *et seq.* and notes.

The case of *Heydenfeldt* vs. *Daney Gold etc. Co.* 3 Otto, p. 634, is relied on as settling this case not only on the point in question but the other points, yet to be considered.

II.

If the Act of March 3d, 1853, did grant Sections 16 and 36 of the mineral lands to the State, did the title vest before survey?

The negative is so clearly established by the authorities, both Federal and State, that we are relieved of the necessity of argument on this point. They maintain that until survey, the rights of the State rest merely in compact; that the grant is in the *nature of a float*, and that no *legal title passes* to the State, until the lands are surveyed and certified over by the Federal officers, thus involving the joint action of the Federal and State authorities.

Collins vs. *Bartlett*, 44 Cal. R. 380.
Hastings vs. *Devlin*, 40 Ib. 363–370.
Hodapp vs. *Sharp*, Ib. 71.
Toland vs. *Mendall*, 38 Ib. 30.
Middleton vs. *Low*, 30 Ib. 596.
Grogan vs. *Knight*, 27 Ib. 515.
R. R. Co. vs. *Smith*, 9 Wall. 99.
R. R. Co. vs. *Fremont Co.*, Ib. 90.
Gaines vs. *Nicholson*, 9 How. 365.
Cooper vs. *Roberts*, 18 Ib. 173.
Frisbie vs. *Whitney*, 9 Wall. 192.

Rector vs. *Ashley*, 6 Ib. 142.
Barry vs. *Gamble*, 3 How. 32.
Bagnell vs. *Broderick*, 13 Pet. 436.
Heydenfeldt vs. *Daney Gold etc. Co.* 3 Otto. 640.
Sherman vs. *Buick*, Ib. 209.
8 Op. Att'y Gen'ls., 224.

The survey does not merely ascertain the locality of the sections, but absolutely creates them.

Grogan vs. *Knight*, 27 Cal. 521.
Robinson vs. *Forrest*, 29 Ib. 325.
Middleton vs. *Low*, 30 Ib. 604.
Cooper vs. *Roberts*, 18 How. 179.
Gaines vs. *Nicholson*, 9 Ib., 365.
Kernan vs. *Griffith*, 27 Cal., 87.

The Act of Feb. 26, 1859 (11 U. S. Stat. at Large, 385), expressly protects pre-emptioners upon unsurveyed lands which subsequently turn out to be in sections 16 and 36, and gives the States lieu lands for the same.

III.

Assuming that the Act of March 3d, 1853, did grant Sections 16 and 36 of the mineral lands to the State, but that the title did not vest before survey, did Congress have the power to dispose of them before the survey, and pass the title adversely to the State?

Assuming the second point above to be settled in the negative—that is that though the grant embraced mineral lands and gave inchoate rights, yet the legal title remained in the United States, and did not vest in the State before survey,—we contend that the land was within Congressional control at any time before survey. In the language of the Court in *Heydenfeldt* vs. *Daney Gold etc. Co.* (3 Otto, 640), "until the *status* of the land was fixed by a survey and they were capable of identification, Congress reserved absolute power over them."

If Congress by *non-action* could have prevented the investiture of the *legal title*, in the State, why not by direct and affirmative action? The power of Congress over the public lands, until the title has passed out of the United States, is absolute, and the legal title may be transmitted according to the will of Congress. If it chooses to pass the legal title to a settler or miner, it leaves the State and its grantee without title, and in ejectment the legal title prevails. The State must select other lands—lieu lands.

See—

Sherman vs. *Buick*, 3 Otto, 209.
Huff vs. *Doyle*, Id. 558.
Water & M. Co. vs. *Bugbey*, 6 Otto, 167
Frisbie vs. *Whitney*, 9 Wall., 192.

Evans vs. *Eaton*, Peters C. C. R. 337.
Satterlee vs. *Matthewson*, 2 Pet., 380.
Bloomer vs. *Stolley*, 5 McLean, 165.
Watson vs. *Mercer*, 8 Pet. 109.
Baltimore and Susquehanna R. R. Co. vs. *Nesbit*, 10 How., 400.
Rector vs. *Ashley*, 6 Wall., 151.
11 Op. Att'y Gen'l, 490.

The case of *Frisbie* vs. *Whitney*, is one of the so-called Suscol cases, affecting the land upon which there were many pre-emptioners, with inchoate rights acquired under then existing laws. Congress chose to grant lands to the claimants under a rejected Mexican grant, thus entirely divesting the pre-emptioners on the land of all claim or right, and preventing them from making entries and obtaining patents which they otherwise could have done.

(See the cases referred to under the second point above).

Before survey Congress might have changed the entire system of public surveys; might have made different sized and different shaped townships and sections; and might have increased or reduced their number. Had this been done, what remedy would the State have had for its *ideal* and *uncreated* sections? There never would have been an *object* to which the grant could have attached. In fact the Act of March 3d, 1853, (Sec. 4), under which the State and its grantee claims, in itself empowers the land department of the Government not only to depart from the rectangular system, when deemed for the public interest, *but also to change the designation of the sections.* But that Act, as we have seen, withheld from sectional survey all the mineral lands. These were never authorized to be surveyed, as already observed, until July 9th, 1870, when by the Act of that date, (16 U. S. Stat, p. 217 *et seq.*, Sec. 16,) it is provided that so much of the Act of March 3d, 1853, "as provides that none other than township lines shall be surveyed where the lands are mineral, is hereby repealed. And the public surveys are hereby extended over all such lands; *provided*," etc. But before this and by the Act of July, 1866, (14 U. S. Stat. p. 251,) entitled "An Act granting the right of way to ditch and canal owners over the public lands and for other purposes," the mineral lands both surveyed and unsurveyed throughout the United States, were drawn forth from their reserved condition, and for the first time in the history of the country, expressly opened up to exploration, occupancy, entry and sale and provision made for the issue of patents therefor.

The surveyed mineral lands referred to in that Act were, of course, those lying in other States and Territories, for, as we have already shown, by reason of the prohibition in the Act of 1853, the mineral lands in California, could not be surveyed into sections. The Act, therefore, of 1866, opened up the unsurveyed mineral lands in this State to exploration and occupancy, and provided for their entry and sale. The exploration and occupancy were to be subject to the local customs and rules of miners of the district. The only survey pro-

vided for by that Act was a survey of the particular mining claim applied for, and that too in the midst and as a part of the proceedings required for obtaining a patent. The mining claim was to be "a vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, or copper." The rules and regulations of miners we all know, historically, limited one location to a certain number of feet on the course of the lode. Sec. 4 of the Act of 1866, as well as section 2 of the Act of 1870, contains similar restrictions. The claimant was required to "file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs and rules of miners." In other words, the location was of so many linear feet on the course of the lode, with its dips, etc. The superficial area that could be claimed was merely "a reasonable quantity of surface for the convenient working of the same as fixed by local rules." The diagram which the claimant filed had no reference to the Government Survey, it was to conform to the claim alone. When the Surveyor-General, in the course of the proceedings, was required to act, he surveyed *the premises*,—that is the mining claim—and made a plat of it "designating the number and description of the location," etc. The patent issued for the mining claim. Of course these mining locations assume all sorts of shapes, and the lines run in every direction. The course of a lode is always at right angles with the dip, and when a certain number of linear feet on the course of the lode were located the diagram would necessarily conform, and so no one survey would be exactly like another. This was anticipated, and Section 4 provides, "that when such location and entry of a mine shall be upon unsurveyed lands, it shall and may be lawful, after the extension thereto of the public surveys, to adjust the surveys to the limits of the premises according to the location and possession of the plat aforesaid; and the Surveyor-General may in extending the surveys vary the same from a rectangular form, to suit the circumstances of the country and the local rules, laws and customs of miners."

Congress, by this Act of 1866, "*disposed* of" the mineral lands or rather provided for a mode of disposition, and no longer "reserved" them from entry or sale. This was done before survey and before the creation of any Sections 16 and 36 in the State of California. The prohibition of sectional surveys of mineral land still prevailed, whilst a new system of surveys peculiar to mining lands was adopted, with forms and numbers different from the general system. The decision of the Court in *Heydenfeldt* vs. *Daney Gold etc. Co.* (3 Otto 638, *et seq.*) fully applies here. "Until the *status* of the lands was fixed by a survey and they were capable of identification, Congress reserved absolute power over them. * * The whole country is interested in the development of our mineral resources, and to secure it, adequate protection was required for those engaged in it. The Act of Congress of July 26, 1866, *supra*, passed before the land in controversy was surveyed, furnishes this protection, by disposing of the mineral lands of the United States to actual occupants and claimants, and providing a method for the acquisition of title. The defendant, and those under whom it claims, occupied the land prior to the survey, and were entitled to purchase. The patent subsequently obtained from the United States, relates back to the time of

the original location and entry, and perfects their right to the exclusion of all adverse intervening claims."

The entire legislation of Congress, and the rulings and decisions of the Land Department of the Government, are in accordance with the propositions relied on by the defendant in error.

IV.

Section 36, in controversy here, could not pass to the State, being likewise exempted by the provisions of Sections 7 and 8 of the Act of March 3d, 1853.—(10 U. S. Stat. 247.)

The material part of section 7 is as follows:

"SEC. 7. *Be it further enacted*, That where any settlement, by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the Act of Congress approved on the twentieth of May, eighteen hundred and twenty-six, entitled 'An Act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for,' and which shall be subject to approval by the Secretary of the Interior." * * * *

This is fully settled by the case of *Sherman* vs. *Buick*, 3 Otto, 209, and the Supreme Court of California is in full accord in the case of *Wedikind* vs. *Craig*, Aug. 7, 1880 (not published.)

The chief reliance of the plaintiff's counsel in the Court below was the case of *Water and M. Co.* vs. *Bugby*, 6 Otto, 165. On examination it will be found that that decision does not in the least conflict with the propositions relied on by defendant in error.

That was an action of ejectment commenced by Bugby, in a District Court of the State of California, thence carried by appeal to the Supreme Court of the State, and thence by writ of error to the Supreme Court of the United States. The property in controversy was a part of Section 16 and part of Section 21, both of which were agricultural lands. The plaintiff Bugby claimed under a State patent, the important part of the decision turning upon Section 16. The defendant had merely a ditch filled with water which crossed over the land in controversy and was sought to be maintained under the Act of Congress of July 26th, 1866. (14 U. S. Stat., 251.) On referring to the Record we learn that it was expressly found by the District Court and remained an undisputed fact in the case, that the lands "*are agricultural and not mineral lands.*"

The question as to what is the law respecting mineral lands was of course not before the Court, and there was no attempt at a solution of the proposition involved in this case. As agricultural land, that section would of course have passed to the State on the survey, unless at that time as held in *Sherman* vs. *Buick*, (3 Otto, 209,) there

were such rights in others as brought the case within the exceptions of the Statute and remitted the State to lieu lands.

The real question before the Court was this: Whether the defendant, the Water Company, fell within one of the exceptions. The entire right of the Company was based upon Section 9 of the Act of the 26th July, 1866. The Court held that "the Company has brought itself within the provisions of that section, if at the time of the passage of the Act the United States held title to the land." The Court then enters upon an examination of that question. It will be seen that so far, the decision is expressly in favor of the defendant in the case at bar; for the whole opinion of the Court goes upon the basis of the right of Congress to dispose of the *title* as long as it is held by the Government, notwithstanding the grant by the Act of 1853. To maintain the plaintiff, Bugby, therefore, it was necessary to arrive at the conclusion that the title had, before the date of the Act of 26th July, 1866, passed into the State. The United States survey was completed on the 19th May, 1866, and the plats deposited in the U. S. Land Office, June 16th, 1866. As between the Company and the State, therefore, the State took the title and became vested with the ownership before the passage of the Act of July 26th, 1866, and before that time Ditch Companies had no rights as against the United States or the State. The Ditch Company, however, sought to defeat Bugby upon another ground also, and that was that the title did not pass to the State, because at the time of the survey, Bugby himself and others, occupied portions of Section 16. But the record showed that no claims were filed by any of these parties, pursuant to Section 6 of the Act of 1853, but that in fact all claims were expressly abandoned, and that Bugby, recognizing the State's title to be good, applied for the State patent and obtained it. It was a singular position for the Ditch Company to assume—to set up Bugby's own possession against Bugby himself, who abandoned all claim to the land, except such as he obtained under the State. But the Court rightfully holds that, "here the Company does not claim under the settler's title, but seeks by means of it to defeat that of the State, and thus leave the land in consideration to be operated upon by the Act of July 26, 1866. The settler, however, was under no obligation to assert his claim, and he having abandoned it, the title of the State became absolute as of May 19, 1866, when the surveys were completed. The case stands, therefore, as if at that date the U. S. had parted with all interest in and control over the property, as the Act of July 26, was not passed until after that time, it follows that it could not operate upon this land in favor of the Company."

That case does not therefore determine the effect of the existence of a settlement under Section 7 of the Act of 1853, upon the 16th and 36th Sections, where the settler does not relinquish his right to remain, nor does it touch upon the subject of "mineral lands" "occupied as towns or villages."

Section 8 of the Act of 1853, is as follows:

"Sec. 8. And be it further enacted, That the public lands, *not being mineral lands*, occupied as towns or villages, shall not be subdi-

vided, or subject to sale, or to be appropriated by settlers, under the provisions of this Act; but the whole of such land, whether settled upon before or after the survey of the same, shall be subject to the provisions of the Act entitled 'An Act for the relief of the citizens of towns upon the lands of the United States, under certain circumstances,' approved May twenty-third, eighteen hundred and forty-four, *except such towns as are located on or near mineral lands*, the inhabitants of which shall have the right of occupation and cultivation only until such time as Congress shall dispose of the same; nor shall any lands specially reserved for public use be appropriated under the provisions of this Act."

The construction of this section would seem to be free from difficulty. Towns located on mineral lands would of course be upon lands that would not be subdivided into sections, nor subject to sale under that Act. But this section places "the public lands, where not mineral lands occupied as towns and villages," on the same basis, and withdraws them from survey into subdivisions and sale, and renders them subject to the Act of March 23d, 1844. And when the towns are located on mineral lands the inhabitants are given the right of occupation and cultivation only "until such time as Congress shall dispose of the same." This was undoubtedly a case of land reserved for "public uses" besides being a case of settlement by dwelling houses; and moreover the right of occupancy by the inhabitants of the town is expressly given until Congress shall dispose of the land. This was following the old policy of the Government in regard to its mines, for even a town site upon the mineral land did not at that period induce the Government to relinquish it. Even the right to mine was not given, but the right of "the inhabitants" was limited to "occupation and cultivation *only*."

In the case at bar we have the existence of a town with several hundred inhabitants upon the section in controversy, with numerous dwelling houses erected, fields cultivated, large mines developed, and the character of the ground as mineral lands placed beyond dispute. It is plain to be seen that the case of *Bugby* vs. *Natoma W. & M. Co.* in no way solves the question now before this Honorable Court. Nor does that case at all contravene the decision in *Sherman* vs. *Buick*, 3 Otto 209. The *nature* of the settlement on school sections which remits the State to lieu lands is there defined, and the Court says "that it is sufficient if it was by the erection of a dwelling house, or by the cultivation of any portion of the land. These things being found to exist when the survey ascertained their location on a school section, the claim of the State to that particular piece of land was at an end; and being shown in the proper mode to the proper officer of the United States, the right of the State to that land was gone, and in lieu of it she had acquired the right to select other lands agreeably to the Act of 1826, subject to the approval of the Secretary of the Interior."

Cases were relied upon in the Court below by the plaintiff as showing that the Act of March 3d, 1853, "was a grant *in presenti* to the State of the land in question, and that the State's title to it became full, perfect and complete *eo instanti*, as soon as the Act received

the signature of the President, and became a law." They will, however, need no extended examination, in view of the decisions of the Supreme Courts of the United States and of the State of California cited and relied upon above. Some of them are in direct conflict with the views of plaintiff's counsel.

Busch vs. *Donahue*, 31 Mich. 480, relied on was a case of swamp lands, and the Secretary of the Interior had listed the lands to the State, and thus indentified them.

In *Tunston* vs. *Metcalf* 40 Miss. 507, it was expressly held that, "without such approval by the Secretary of the Interior, expressly appearing in evidence, or by necessary inference, from a patent to the State for the *particular land* in controversy, no title vested in the State thereto, and none could be conveyed by the patent to the plaintiff below."

In none of the cases relied on were mineral lands involved. In none of them was the question of the power of Congress, before survey of the lands, commented on or determined.

V.

It is competent in ejectment, to show that at the time the State issued its patent to plaintiff's grantor, it had no title to the lands in controversy, and that by the United States patent the title passed to the defendant.

Sherman vs. *Buick*, 3 Otto, p. 209.
Polk's Lessee vs. *Wendell*, 9 Cranch, 99.
Patterson vs. *Winn*, 11 Wheat, 384.
Patterson vs. *Tatum*, Field J.—in U. S. Circuit Ct. of Cal. 3 Sawy. R., 164.

VI.

If the State took title in presenti at the date of the Act of March 3d, 1853, then plaintiff's title is barred by the Statute of Limitations.

Sections 315–316 and 9 of the Code of Civil Procedure of the State of California merely re-enact the Act of 1850, and are as follows:

SEC. 315. The people of this State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless—

1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or

2. The people or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years.

SEC. 316. No action can be brought for or in respect to real property by any person claiming under letters patent or grants from this State, unless the same might have been commenced by the people as herein specified, in case such patent had not been issued or grant made.

SEC 9. When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation is prescribed in this Code, the time which has already run shall be deemed part of the time prescribed as such limitation by this Code.

It is respectfully submitted,

1st. The grant to the State of Sections 16 and 36, by the Act of March 3d, 1853, did not embrace mineral land.

2d. If that grant did embrace mineral land, still the title remained in the United States, and did not pass to the State until survey by the General Government.

3d. Until survey, the United States had absolute power over these lands, and could transmit the title to others than the State.

4th. That these questions regularly arise in this case, and are available in defense in ejectment.

5th. If the State took title by the Act of 1853, this action is barred.

6th. The title at the time of the commencement of this action was vested in the defendant.

Respectfully submitted.

S. M. WILSON,

OCTOBER, 1880. *Of Counsel for Defendant in error.*

OFFICE SUPREME COURT U.S.
FILED
NOV 4 1880
JAMES H. McKENNEY, Clerk.

IN SUPREME COURT OF THE UNITED STATES.

IVANHOE MINING COMPANY,
Plaintiff in Error,

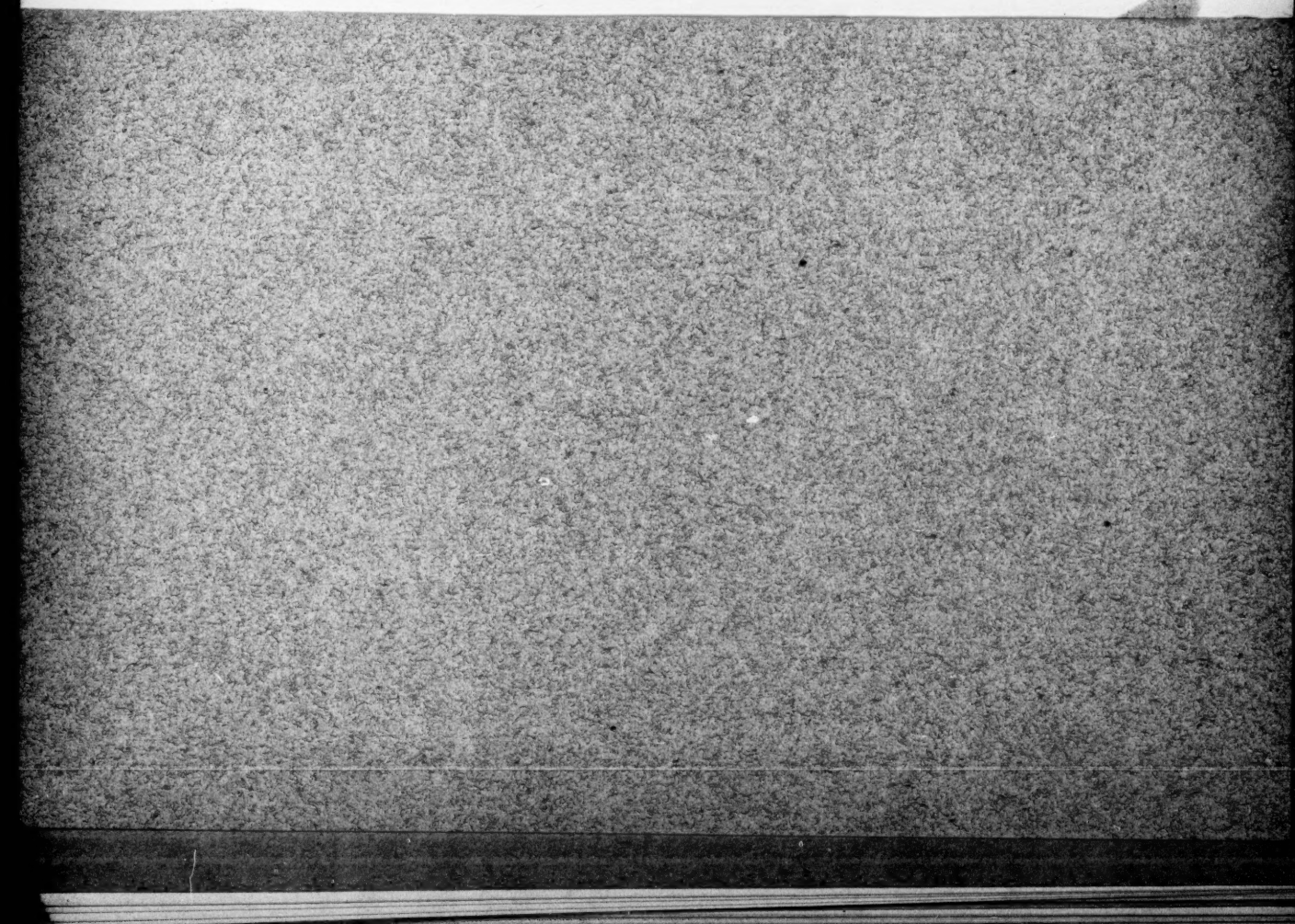
vs:

KEYSTONE CONSOLIDATED MINING COMPANY,
Defendant in Error.

Supplemental Points and Authorities on behalf of Defendant in Error.

S. M. WILSON,
of Counsel for Defendant in Error.

R. O. Polkinhorn, Printer, Washington, D. C.



In Supreme Court of the United States.

Ivanhoe Mining Company,
Plaintiff in Error,

vs:

Keystone Consolidated Mining Company,
Defendant in Error:

Supplemental Points and Authorities on behalf of Defendant in Error.

The following extract from Weeks on Mineral Lands shows the former policy of the General Government in regard to mineral lands, and their reservation from sale or other disposition, down to the act of July 26, 1866. (14 U. S. Stat., p. 251):

"It had been a well-known policy of the Government of the United States from the time of its foundation, to reserve from sale all land containing minerals or 'known mines.' This policy was not in any degree disturbed until the passage of the act of 1866, known as the first Congressional Mining Act. In 1850 the policy of the nation's selling the mines for the purposes of obtaining public revenue began to be discussed in the National Legislature. But, after much controversy, the arguments in favor of leaving the mines free and open for exploration and development prevailed, and adverse measures were defeated or abandoned. From that time till 1866 non-action was the policy of the

Government. At this time the necessity of Congressional action, long before felt, came to be directly recognized. In the annual report of the Secretary of the Treasury for the year 1865, the substitution of an absolute title in fee for the indefinite property rights or claims under which the mines were held by private parties, was earnestly recommended. It was urged that the right to obtain a 'fee-simple title' would invite to the mineral district men of character and enterprise, and would give permanency to settlements, by the stimulus which ownership always produces. Under the then existing condition of things, constant fear was felt by those who were engaged in mining pursuits, that some disturbance and interference with the rights of property, such as they had, would occur. This fear was not groundless. Measures for the sale of the mines and for the taxation of miners as a class, had, from time to time, been proposed; besides, the Government had the undoubted *legal* right to treat every miner upon the public domain as a naked trespasser.

"The passage of the act of 1866, with all its defects, marked a change in the governmental policy, and introduced a new era in the history of mining enterprises."

Again, the same author says (at pp. 39, *et seq.*): "It has already been stated that it had always been the policy of the Government of the United States to reserve from sale and pre-emption entry lands containing mineral or 'known mines.' The truth of this statement will be demonstrated by reference to various acts of Congress." The author reviews these at length in the succeeding pages, to which the attention of the court is respectfully invited.

Notably among these acts was the pre-emption law of 1841, (5 U. S. Stat. at Large, 453,) which declares that "no lands on which are situated any known salines or *mines* shall be liable to entry under and by virtue of the provisions of this act."

In *United States* vs. *Gratiot*, 14 Pet., R. 538, it was said: "It has been the policy of the Government at all times in disposing of the public lands to reserve the mines for the use of the United States."

See also *United States* vs. *Gear*, 3 How., 120.
Gold Quartz M. Co. vs. *Iser*, 5 Oregon, 107.
United States vs. *Parrott*, 1 McAllister, 271.

The act of September 27th, 1850, (9 U. S. Stat. at Large, 496,) creating the office of surveyor general and providing for surveys of public lands in Oregon, made donations to actual settlers, but excluded them from mineral lands.

Similar donations of homesteads in Alabama, Mississippi, Louisiana, Arkansas and Florida, were made, but mineral lands were excepted.

14 U. S. Stat., pp. 66–67, Sec. 1.
See other statutes cited in former briefs, pp. 4–5.

On the 30 January, 1865, both houses of Congress passed a joint resolution as follows:

"That no act passed at the first session of the 38th Congress granting lands to States or to corporations, to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States, unless otherwise specifically provided in the act or acts making the grant."

13 U. S. Stat., 568.

So the act of 1854, relating to the public lands in Nebraska, New Mexico and Kansas, and granting prĕemptions, donations, etc., declared (sec. 4) that none of its provisions should apply to mineral lands."

It will be remembered that California adopted a State constitution, and organized under it, without any previous authority of Congress. There was no enabling act, and the State continued to exist under that independent organization for about a year before being admitted into the Union. The act of Congress admitting the State into the Union contained neither a grant of any school lands nor a promise of one. There was not any *compact* such as is referred to in some of the cases growing out of enabling acts or acts of admission into the Union. The California act of admission, however, provided that the State should never interfere with the primary disposal of the public lands within its limits or do any act whereby the title to the United States to, and right to dispose of, said lands should be impaired or questioned.

There was no grant of any school sections or seminary lands or of the 500,000 acres until the 3d of March, 1853. (10 U. S. Stat., 244.)

Commenting on Section 6 of that act, the court, in *Sherman* vs. *Buick*, 3 Otto, 309, says: "It is obviously the main purpose of the section to declare that *after the lands are surveyed* they shall be subject to sale, according to the general land system of the Government; and secondly, to subject them to the right of pre-emption, as defined by the act of 1841, and to extend that right to lands unsurveyed as well as to those surveyed. But here it seems to have occurred to the framer of the act that California, like other States in which the public lands lay, ought to have the sixteenth and thirty-sixth sections of each township for school purposes, and that they should not be liable to the *general* pre-emption law as other public lands of the Government should be. He accordingly interjected into the sentence the grant of these lands to the State and the exception of them from the operation of the pre-emption law of 1841, together with the lands which in like manner were neither

to be sold nor made subject to pre-emption. These were lands appropriated under the authority of that act or reserved by competent authority—lands claimed under any foreign grant or title (*i. e.* Mexican grants) *mineral lands.* All these were by this clause exempted from sale and the general operation of the pre-emption laws."

It will be remembered that the act of March 3d, 1853, expressly prohibited any survey of the sectional lines of townships, thus showing a withholding of these lands from the school land grant, as that could only take effect upon lands after the survey into sections.

As the court says, in *Sherman* vs. *Buick*, it granted "to said State, for school purposes, with certain limitations, every sixteenth and thirty-sixth section, *according to surveys thereafter to be made.*" The surveys of the other lands were provided for, but that of the mineral lands being prohibited, the latter necessarily were left for future Congressional legislation. As the court again remarks, in the same case: "But the experience of the operations of our land system in other States suggested that it might be ten or twenty, and, in some instances, thirty years before all the surveys would be completed and the precise location of each school section known." The court shows the protection then given to settlers and others, who might locate upon land which, on survey, would turn out to be on sections 16 and 36.

But the State of California became impatient of the delay in the surveys, and, independently of the Federal authorities, a series of legislative acts were passed by the State, and upon its own surveys it commenced to ascertain the school sections and to select the granted lands.

Statutes of California, 1852, p. 41;
Ib., 1855, p. 281;
Ib., 1857, p. 358;

Ib., 1858, p. 248;
Ib., " p. 318;
Ib., 1859, p. 33;
Ib., " p. 301;
Ib., 1861, p. 218.

These acts went so far upon the proposition of a grant *in presenti*, that they not only provide for settlements on surveyed and unsurveyed lands, but also for demands upon the United States officers, and required the latter to recognize such State locations, and list them over to the State. It was further provided that in case the United States officers did not comply, the State land officers should give certificates which should be *prima facie* evidence of title, and entitle the holder to recover the lands described in the certificates.

In some of these acts the holders of the State scrip were made the State's locating agents; in others, the surveyor general, and in others a commissioner, appointed by the Governor, was made such State agent. Provision was also made for a sale of these lands at auction by the sheriff of the county, on request of a certain number of citizens. By these statutes it was also enacted that even lieu lands should be selected and disposed of, and that, too, on unsurveyed lands, and without any co-operation or concurrence of the Federal authorities.

Extraordinary as this legislation was, some of the decisions of the courts maintained its validity.

See *Summers* vs. *Dickinson*, 9 Cal., 554;
Owens vs. *Jackson*, *Id.*, 324;
Van Valkenburg vs. *McCloud*, 21 *Id.*, 330;
Higgins vs. *Houghton*, 25 *Id.*, 254.

The Federal authorities, however, refused to concur in these proceedings, and utterly disregarded them. Then the State authorities, legislative and judicial, began to doubt,

for great difficulties and embarrassments began to present themselves. The *personnel* of the Supreme Court changed, and then followed a series of decisions holding the State surveys and locations without the concurrence of the Federal authorities null and void.

See *Grogan* vs. *Knight*, 27 Cal., 509;
Middleton vs. *Low*, 30 *Id.*, 596;
Toland vs. *Mendall*, 38 *Id.*, 30;
Hastings vs. *Derlin*, 40 *Id.*, 363;
Hodap vs. *Sharp*, *Id.*, 71;
Collins vs. *Barrett*, 44 *Id.*, 377.

The legislative branch of the State government, becoming alarmed at this condition of things, passed a joint resolution asking relief from the General Government and a confirmation of their illegal proceedings.

Statute of Cal., 1863, p. 794, quoted at length in *Toland* vs. *Mandell*, 38 Cal. R., 40.

In obedience to this solicitation by the State, Congress passed the act of the 23d July, 1866, (14 U. S. Stat. at Large, p. 218,) confirming the State's action, so far as *bona fide* purchasers from the State were concerned, with certain qualifications, limitations, and exceptions; but the act expressly excluded from confirmation all the *mineral lands*. This was not only a clear construction of the original act of 1853, but an express announcement that the mineral lands were yet to be disposed of by the General Government. Why should this exemption be made if, originally, school sections embraced mineral lands? If the school sections, vested by the act of 1853, whether the lands be mineral or agricultural, why, in confirming the illegal proceeding on the part of the State in favor of *bona fide holders*, should the grantee of the State on agricultural lands alone be protected whilst the grantee of mining lands was left unprotected? The answer is man-

ifest—the mining lands were always excepted from the grant to the State. The surveys of mineral lands were absolutely forbidden, and, of course, the attempt of the State to survey them was not a mere blunder, but an open and defiant proceeding against the express prohibition of law. This exception of the mineral lands, in this confirmatory act, was also in accord with the understanding of Congress at the time of the passage of the act of 1853, that mineral lands were reserved for the future action of Congress. At the time the bill was before Congress the representative from California (Mr. McCorkle) in reply to Mr. Breckenridge, of Kentucky, expressly declared that the bill did not embrace mineral lands, but that they were reserved. The debates throughout show this understanding.

See Congressional Globe, vol. 24, pp. 1770, *et seq*;
Ib., pp. 2477, *et seq*.

These debates and proceedings may be referred to with a view to ascertain the general scope and object of an act.

See *Jennison* vs. *Kirk*, 8 Otto, 460;
Ah Kou vs. *Nunan*, 5 Sawyer, 560;
Broder vs. *Water Co.*, 11 Otto, 274;

The confirmatory act of 1866, passed pursuant to the joint resolution of the State Legislature was afterwards accepted and acted upon by the State authorities—legislative and judicial. The Legislature at its next session (they being merely biennial, Cal. Stat., 1867–8, p. 507) repealed all of its laws on the subject and passed an act consistent with and conforming to the act of Congress of 23 July, 1866. That act of Congress is specifically mentioned in the act of the legislature, and provision is made for carrying it into effect. Sec. 15 is as follows:

"SEC. 15. It shall be the duty of the State Surveyor-General to represent the State in all cases of conflict of title between the State and the United States, and when he shall

desire to take testimony under the provisions of the act of Congress to quiet titles in California, passed July, 1866, he shall request the U. S. Surveyor-General to set a time and place for hearing the same, convenient of access to the witnesses in the case. If the United States Surveyor-General shall name any place other than his office it shall be lawful for him to charge the State with his necessary traveling expenses," &c., * *. "In any case of conflict between the United States and the State or any purchaser under the State, when the Surveyor-General of the State shall deem it necessary he shall request the Attorney-General to attend the trial on the part of the State; and it shall be the duty of the Attorney-General to attend if not prevented by other official duties, and the actual traveling expenses," &c.

In no part of this act does the State assert any right to mineral lands or make any provision concerning them. This act, too, is fully commented on, and the validity and force of its provisions maintained in the subsequent California cases.

See *Toland* vs *Mendall*, 38 Cal., 30;
Keeran vs. *Allen*, 33 Ib., 546.
Collins vs. *Barrett*, 44 Ib., 377.

Since the act of 1866 the entire action of the State authorities has been in conformity thereto. This shows a complete agreement on the part of the State that she has no longer any claim to school sections located on mineral lands, and brings the case within the doctrine of—

Hydenfeldt vs. *Daney*, Nevada, R., pg.;
S. C., 3 Otto, 634.
See, also, *Higgins* vs. *Houghton*, 25 Cal., 254.

The Mining Act, approved 26th July, 1866, (14 U. S. Stat., 251,) was pending before Congress at the same time with the confirmatory act, approved July 23d, 1866, (14 U. S. Stat., pg. 218.) They were, doubtless, both before

the President for approval at the same date; and the three days intervening between the two is probably purely accidental and without design. In one—the confirmatory act—Congress reserves from its operation the mining lands; in the other, Congress expressly legislates upon the mining lands *surveyed and unsurveyed*—declares them free and open to explanation and occupation; subjects them to the local rules and customs of miners, and provides for the issue of patents for mining claims. But still *no sections* are to be surveyed. The only surveys were to be of the mining claims, varying "from a rectangular form to suit the circumstances of the country and the local rules, laws and customs of miners."

As these right were given upon unsurveyed mining land, indiscriminately, it was a matter of no importance that the miner was found, subsequently, to be upon a section 16 or 36. In this condition the right of the defendants in error became vested, and under and pursuant to that act it obtained its patents.

Learned counsel, however, in their brief (Messrs. Butler & Barrett, p. 8, *et seq*,) claim that defendants' patent is void, for three reasons:

"First. The locations were on unsurveyed lands.

"Second. The land had been granted to the State of California.

"Third. When the defendant applied to the surveyor-general the State of California filed an adverse claim, and prosecuted it continually until the issuance of the patent, all of which are found facts in the record."

Now, the first of these grounds is completely answered by the first section of the act of 26th July, 1866, which directly refers to *unsurveyed* lands. In fact, the whole mining act would have been useless in California had it not applied to unsurveyed land, as the survey of mining

lands had been prohibited in that State by the act of 1853, which still remained unrepealed.

The second ground is the *petitio principii*, and cannot be assumed to be true as a basis of the argument to demonstrate its truth.

As to the third ground, counsel for the plaintiff in error labor under a mistaken view of the proper construction of the statute. The whole act is based upon the proposition that the title to the land applied for is solely and exclusively in the United States. The Government is disposing of her own lands alone, and consequently there can be no contest of title. There may be, and constantly has been, a contest over the possessory right or claim under the local customs and rules of miners referred to in the act. There priority of occupation in conformity with the local rules and regulations gives priority of right to possession. Of course, the question of location in the proper manner, the amount of work to be done to hold the claim, abandonment and such like questions peculiar to mere possessory claims, arise. The adverse claims referred to in the law are solely of that class. The claimant of the mining ground seeking a patent must be one "in regard to whose *possession* there is no controversy or opposing *claim*." (Section 2.) So section 6 provides, "that whenever any adverse claimants to any mine located and claimed as aforesaid shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until final settlement and adjudication, in the courts of competent jurisdiction, *of the rights of possession* to such claim, *when a patent may issue as in other cases*." Of course, no United States patent is to issue either to the State, or claimant under the State, but only to the successful miner who proves up the best possessory title according to the local customs and usages of miners. It would be useless to call upon a court to determine other titles. A holder of a Mexican title or a United

States patent, or any other title than a possessory one, can always prosecute or defend in the ordinary courts of the country. He does not forfeit anything by not interposing his claim in the local land office. That duty only devolves on one who loses rights by a failure to present his claim. It is submitted that neither the State having title nor the claimant under a State patent of school lands, is required, or even permitted, to interpose as a protestant against a mining claim. This has been the uniform ruling of the Land Department of the Government.

The act of May 10th, 1872, sec. 7, amendatory of the original act of 1866, elaborates the proceedings of protestants, but ends the same way, and only makes more plain the above views.

The learned counsel is equally in error in regard to the construction of the act of 1826 in regard to lieu lands. (Brief, p. 11.) That act does not permit the State to select smaller quantities than a section, except where the original township was fractional, and then the land in lieu of the lost land is in proportion to the amount in the fractional township.

4 U. S. Stat., 179.

The learned counsel also err in supposing that the selections of seminary lands and lands for public buildings rest entirely with the State. The acts provide for an approval by the Federal officials, who always can exercise the veto power on the State's selection.

There are other errors in counsel's brief that time would not permit to be answered here, but attention will be called to them necessarily on the oral argument. We must, however, call attention to the proposition that no settlement by dwelling-house is shown on any of the mining tracts at the time of the Government survey. The findings of fact show

that there was a town on the east half of the section. That town extended into the four quarter-sections, and a patent issued to the inhabitants of the town for eighty acres, each in two quarter-sections, and for forty acres each in the other two quarter-sections. The mines are in the town, and are excluded from the United States patent to the town, but are covered by the patents to the mine owners. It is manifest, therefore, from the statement of facts by the court, that each quarter-section was actually occupied and settled upon, not only by miners, but by residents of the town in their dwellings, the whole community being a mining community, deriving their employment entirely from the mines there.

As to the statute of limitations, it only remains to be said that the decisions cited by counsel for the plaintiff in error are not the latest nor prevailing decisions on the subject.

In *McManus* vs. *Sullivan*, 48 Cal., 15, the court says: "It has been repeatedly determined in this court that a possession taken and held by a defendant for the requisite period, in hostility to the title or claim set up by a plaintiff in the action of ejectment, amounts to an adverse possession against the plaintiff sufficient to bar a recovery, even though the defendant, while so in possession, admitted the validity of a title outstanding in a third person."

See, also, *Paye* vs. *Fowler*, 28 Cal., 61;
S. C., 37 *Id.*, 108;
Farrish vs. *Coon*, 40 *Id.*, 57;
Hayes vs. *Martin*, 45 *Id.*, 559.

Respectfully submitted.

S. M. WILSON,
Of Counsel for Defendant in Error.

OFFICE SUPREME COURT U. S.
FILED
OCT 12 1889
JAMES H. McKENNEY, Clerk.

SUPREME COURT

OF THE

UNITED STATES.

THE IVANHOE MINING CO.

Plaintiff in Error,

vs.

THE KEYSTONE CONSOLIDATED MINING CO.

Defendant in Error.

BRIEF OF GEO. A. NOURSE,

Attorney and Counsel for Defendant in Error.

SUPREME COURT

OF THE

UNITED STATES.

THE IVANHOE MINING CO.,
Plaintiff in Error,
v.
THE KEYSTONE CONSOLIDATED MINING CO.,
Defendant in Error.

BRIEF of GEO. A. NOURSE,

Attorney and Counsel for Defendant in Error.

This is an action of ejectment, brought March 25th, 1874, in the District Court of the Twelfth Judicial District of the State of California, within and for the City and County of San Francisco, by DANIEL W. GILLETT, as plaintiff, against the defendant in error, as defendant, to recover possession of E. $\frac{1}{2}$ of Sect. 36, T. 7 North, R. 10 East M. D. M.; alleged, in the complaint, to be

owned by the plaintiff, in fee simple, ever since March 27, 1872.

The complaint further alleges that defendant had, since said date, dug out from said premises gold-bearing quartz and gold minerals, of the value of $288,000, for which the plaintiff claimed $500,000 damages.

The defendant demurred to this complaint, on the ground that these two causes of action were improperly united.

California Code of Civil Procedure, § 430, Subd. 5.

That code allows a plaintiff to unite several causes of action, "where they all arise out of * "* * * claims to recover specific real prop- "erty, with or without damages for the withhold- "ing thereof, or for waste committed thereon, "and the rents and profits of the same."

§ 427, Code Civ. Pro., Subdiv. 2.

It does not allow the uniting with a claim to recover specific real property, a claim for damages for a mere trespass, committed by a defendant having no privity with the plaintiff.

But the demurrer was overruled in the State Court, and thereupon defendant filed its

ANSWER.

1. Denying plaintiff's ownership and right of possession of the demanded premises, or any part thereof.

2. The *ouster* of plaintiff by defendant; and

3. The possession, by defendant, of any portion of the demanded premises, except three parcels specifically described; being the Spring Hill Mine, the Keystone Mine, and a certain cultivated field.

4. Said answer further pleaded the statute of limitations to the claim of plaintiff; and

5. It further alleges improvements made by defendant on the premises, while in possession under color of title, to the amount of $300,000, which it asks to be set off against any claim of damages made by plaintiff.

After answer filed the case was, on motion of defendant, transferred to the United States Circuit Court for the District of California, the plaintiff being a citizen of New York and the defendant a California corporation.

Upon trial in the Circuit Court, judgment was given in favor of defendant, upon an agreed statement of facts substantially embodied in the Findings.

The plaintiff dying after judgment, the Ivanhoe Mining Company seems to have obtained from his heirs conveyances of their interest in the demanded premises, and on this showing was by an *ex parte* order, substituted as plaintiff, and at once sued out the Writ of Error, upon which the case comes before this court.

AT THE TRIAL.

The only question raised was upon the ownership of the demanded premises and that is the sole issue here.

As the Findings show, both parties seek to deraign title from the United States, the paramount source of title; the plaintiff producing a patent from the State of California to himself, and claiming that the whole section 36, (of which the demanded premises are the east half,) passed to the State by the school-land grant of March 3, 1853; while the defendant claims under mining patents issued by the United States directly to itself.

It will be seen that the whole controversy is, whether said Section 36 passed to the State by said grant.

THE SCHOOL-LAND GRANT

To the State of California is found in Section 6 of the Act of Congress, approved March 3, 1853, entitled "An act to provide for the survey of "the public lands in California, the granting of "pre-emption rights therein, and for other pur- "poses," in the following words—this immense grant being made by a mere parenthetical provision, interjected into a sentence whose chief subject is the granting of pre-emption rights:

"Sect. 6. *And be it further enacted*, that all the "public lands in the State of California, whether "surveyed or unsurveyed, WITH THE EXCEPTION OF "SECTIONS SIXTEEN AND THIRTY-SIX, WHICH SHALL BE, "AND HEREBY ARE GRANTED TO THE STATE FOR THE "PURPOSES OF PUBLIC SCHOOLS IN EACH TOWNSHIP, "and with the exception of lands appropriated "under the authority of this Act, or reserved by "competent authority, and excepting also the "lands claimed under any foreign grant or title, "and the mineral lands, shall be subject to the "pre-emption laws of fourth September, eighteen "hundred and forty-one, with all the exceptions, "conditions and limitations therein contained, "*except as herein otherwise provided.*" * * *

If there were nothing in the case to take out of this grant the Section 36, which includes the demanded premises, there would be no room for argument, for the grant would convey the section to the State, and the State patent would convey it to the plaintiff.

In behalf of the defendant in error, we claim

that the land in question did not pass to the State of California by virtue of the school-land grant above cited, for three reasons:

1. This section was settled upon by the erection of a whole village of dwelling houses, and by the cultivation of a portion of the land, very many years before survey, and is thus specially excepted from the grant of Sections 16 and 36, by said Section 7 of the very Act which makes said grant.

2. Even were it not thus expressly and in terms excepted from the grant, this land would not pass to the State by virtue thereof, for the grant, being of Sections 16 and 36, *eo nomine*, could not operate upon this land until, by U. S. survey, it became Section 36. Many years before such survey, defendant had acquired a right to occupy and enter its mining claims, under the Act of Congress of July 26, 1866, which right has since ripened into a perfect title by the patents for said claims, issued to it by the United States. This right thus vested, could not be taken away upon subsequent survey, by the school-land grant.

3. This land, being confessedly mineral land, was, by necessary implication, excepted from said school-land grant.

That our position may be more clearly understood, I will briefly state, as I find them established by history, and the findings of the Court below, the

FACTS OF THE CASE,

Giving them in their chronological order, for a better understanding.

How California was invaded and overrun by the Argonauts of '49; how they followed up every valley, turning aside rivers, constructing ditches, tunneling mountains, and washing away hillsides,

in their search for gold, is matter of history. It is also matter of history, that long before the placer mines had become exhausted, they began to seek in the quartz ledges the matrix of the gold which had washed down the streams, and to take up and locate those ledges in which they found gold, as they had located their placer claims; hoping to find there the inexhaustible reservoirs of the precious metals, of which they fancied the placers to be the mere leakage. These locations were made and maintained under rules enacted and customs adopted by the miners themselves, each district having its own code; but "the similarity of these rules and customs "throughout the entire mining region, was so "great as to attain all the beneficial results of "well-digested general laws."

3 Wallace, 777, Appendix.

The United States government looked on approvingly, and refused to prohibit this wholesale appropriation of its mines, while it should mature a system for selling its mineral lands to actual locators.

The U. S. Senate so unanimously favored this free mining, that it refused to add to a bill for police regulations in the mines, any provisions requiring payment from miners, as purchase-money or rent, as a condition for the right to hold mining locations, or to mine. (Ibid.)

The Legislature of California, in 1851, enacted that the rules and regulations of miners might be offered in evidence in all controversies concerning mining claims, and that they should *govern the decision*, when not in conflict with the Constitution or laws of the State or the United States.

The other gold-producing States and Territories had similar enactments, and the Supreme Court of the United States, upon solemn deliberation,

refused to hold, that possessory claims to mines, the paramount title to which was in the United States, before any legislation on the subject by Congress, having no sanction save these mining rules and customs, were not property capable of being valued in money.

3 Wallace, 97, *Sparrow* v. *Strong* (p. 104.)

It is matter of history that the first quartz mine located in California, was the "Spring Hill,"

NEW AMERICAN ENCYCLOPEDIA—TITLE, "GOLD."

This was located by the predecessors in interest of the defendant, in 1851.

The same year, the "Original Amador," "Rancherie," (now "Bunker Hill,") "Granite State," and "Pleasant Ridge" (now known as the "Keystone,") were located, and quartz mills for crushing the ore from them were built and put into operation, on this same half section now claimed by plaintiff. The "Keystone" mine (originally the "Granite State" and "Pleasant Ridge"), was re-located in 1853, by the predecessors in interest of defendant, as was also the "Geneva" in 1863.

The "Spring Hill" and "Geneva" form the most northeasterly, and the "Keystone" the most southwesterly of the two tracts of mining ground patented to the defendant by the United States, as shown on theplat "Exhibit A."

All these locations were made "in accordance " with the existing rules of the mining district, " and the customs of miners."

(Finding I, subd. 5, page 20 of transcript.)

"The original locators of each of said claims, " and their grantees, have held undisturbed pos- " session thereof from the date of their location " up to the present time, and the possessory title " to each of said claims acquired by said locations

" respectively, and by such possession and the " working of said mines, was vested in defendant " at the time of its application for patents for " said mines," (Jan. 6, 1871) so far as such location and occupation could give title.

(Subdiv. 6 of same finding.)

The act of Congress of July 26, 1866 (14 Stat. at Large, 253), opening the mineral lands of the United States to exploration and occupation, and providing for their sale to actual occupants,— found this defendant in actual possession of these mines. It legalized this possession. Thenceforward defendant occupied and worked these mines by authority of this statute.

Early in January 1871, the defendant applied at the local U. S. Land Office for a U. S. patent for its mines, and in July 1873, patents for said mines were issued to it by the United States.

I drop the narrative here, for a moment, to ask whether there can be a doubt that these patents would have conveyed a perfect title to defendant (notwithstanding the school-land grant of March 3, 1853), if the township had not been surveyed into sections, and so there had been no Section 36 in the township when these mining patents issued: whether a subsequent survey into sections could then have even raised a question concerning such patent title?

To proceed with the narrative:

In 1850 a little " mining camp " grew up on the land in dispute, composed of miners who were working the placer mines in that vicinity. It took the ambitious name of " Amador City." The location and working of the quartz mines and the erection and operating of the quartz mills which I have mentioned necessarily brought in more workmen (in those days there were no women or children in the diggings) and by

the fall of 1851 there were 175 to 200 men in the village. This number increased considerably by 1853, and in 1858 there were 400 to 500 inhabitants of the town, at about which number the population has since stood.

The photographs B and C show the village as it was in 1871, not changed materially from 1858; almost all the houses therein shown, being on the demanded premises.

Nov. 28, 1870, (town sites on mineral land having been intermediately brought by statute under the operation of the general town site act) the County Judge of Amador county filed in the U. S. Land Office his application to enter the greater portion of the demanded premises, as the town site of Amador City, and in due time U. S. patent issued to him—in trust for the inhabitants—for all the land so applied for by him, excepting that patented to the mining corporations as aforesaid and an 80-acre piece not in controversy here.

While these mine locations and town building were going on, the Act of Congress from which I have quoted was enacted, March 3, 1853. In it is found the school-land grant relied upon by plaintiff.

So far as then appeared, the only portions thereof which interested the mine-owners and towns-people of Amador City, were:

1. That, while the public lands in California, not mineral, occupied as towns or villages, were made to be subject to entry under the town-site Act of May 23, 1844,—to inhabitants of towns *on mineral land* was given "the right of occupation "and cultivation, only, until such time as Con- "gress shall dispose of the same." (Section 8.)

2. That "none other than township lines "shall be surveyed when the lands are mineral." (Section 3.)

3. That, while Sections 16 and 36 in each township were granted, by Section 6, to the State, it was not possible that the State should take, under this grant, their own little homes or their mining claims, for the double reason that:

First. The land, being mineral, could not be surveyed into sections (as per Section 3, above cited), and so there could not be a Section 16 or 36 in that township; and

Secondly. Settlement having been made on their town-site, both by the erection of dwelling houses and the cultivation of land, the land would be excepted from the grant, even if a survey should be made, and it should prove to be in a Section 16 or 36, upon such survey. (Section 7 of said Act.)

As mineral land was, in like manner, excluded from pre-emption settlement, they were safe from the claims of pre-emption settlers.

So these unsophisticated pioneers went on locating mines and making homes, and borrowed no trouble about their titles, thinking that the statute meant what it said.

THE SURVEY.

July 9, 1870, Congress repealed the portion of Section 3 of said Act of March 3, 1853, which had hitherto prohibited the survey of any other than township lines on mineral lands. (16 U. S. Stat. 217–18.)

In apparent anticipation of this, the U. S. Surveyor-General for California, in defiance of the U. S. statute then prohibiting the survey of other than township lines on mineral land, surveyed the section lines of this township in the field in the month of March, 1870; but the township plat was not filed in the U. S. Land Office until October 7, 1870.

Of course, this survey found the mines which I have named: "Bunker Hill," "Original Amador," "Spring Hill," "Keystone," "Last Chance," "Nevada," "Eclipse" and "El Dorado" occupied by their several owners, and within the east half of the section 36, which was created by this survey, and the village of Amador City with its 500 people on the same half section.

One Henry Casey seems to have been selected as the instrument to attempt to rob these people of their homes and their property. It would not be proper for me to name his employee, for the record does not disclose it.

This man Casey, in June 1870, soon after the survey in the field and four months before the filing of the township plat in the U. S. Land Office applied to the Surveyor-General of the State of California to purchase from the State this half section, and October 21 of the same year he received from the State a certificate of purchase therefor.

On the 3d day of October, A.D. 1872, a patent was issued by the State of California to the plaintiff below (to whom Casey had transferred his right in the premises), in spite of the protest of the defendant against its issuance, then on file in the said Land Office. A reference to the statute of the State providing for the sale of its public lands (page 522, statutes 1868–9), will show that the purchase-money paid by Mr. Casey for this half section, including all these mines and mills, and this town of Amador City, was *four hundred dollars;* the price fixed by statute being $1.25 per acre.

The issuance of this certificate of purchase was the first intimation to the inhabitants of Amador City, and the owners of these mines, that any attempt was to be made to rob them of their property. The tidings aroused them like the

fire bell in the night. Within three months after the filing of the township plat, applications were on file in the United States Land Office, for the entry of the town site by the County Judge, in trust for its inhabitants, and for the purchase of all these mines by the owners of the possessory titles thereto.

After a bitter contest in the United States Land Office, the Register and Receiver held that the rights acquired by the towns-people and the mine owners before the survey had made a section 36, antedated the claim of the State, which could not attach until there was a section 36; that even if it were not so, the land in question was excepted from the school land grant by section 7 of the Grant-Act of March 3, 1853, and also by the fact that it was mineral land.

An appeal was taken from this decision to the Commissioner of the General Land Office, who, on the 18th day of June, 1872, affirmed the decision of the Register and Receiver. On appeal from this decision, the Secretary of the Interior, in an elaborate decision, discussing the legal questions involved, with an acumen rarely displayed in Departmental decisions, affirmed the decision of the local officers, and of the Commissioner, and sustained the claims of the mine owners and the towns-people upon every point.

A copy of these decisions will be furnished with this brief, to each one of the Justices of this Court.

In due course of official routine, after the rendering of this decision, and in accordance therewith, United States patents were issued to the defendant for its mines in July 1873, as also to the owners of the other mines which I have named—for their mines—and to the Judge of the County Court of Amador County for the town site. Before each of these tribunals which

I have named the case was tried, and argued with a thoroughness seldom paralleled. The State's claim was pressed by the ablest talent which money could command.

But the hope of getting for $400 a mine which the record shows to have yielded $288,000 in about two years, with half a dozen other valuable mines, and a whole town thrown in, was not to be given up so long as a possibility of success remained.

The State having issued its patent for this half section to Casey's grantee, as already stated, this suit was commenced for the recovery of the demanded premises, including the two mining claims of the defendant (the two making, in fact, one mine,) and its tract of cultivated land. The learned Judge of the Circuit Court (a jury being waived) gave judgment for the defendant, sustaining every claim made by it, and affirming the decision of the Land Department of the United States.

Upon the writ of error the question is simply whether the findings justify the judgment of the court below.

Having thus stated the facts, I will say a few words in support of the propositions hereinbefore laid down, as those upon which defendant in error rests, reversing, however, the order in which they were first stated:

POINTS AND AUTHORITIES.

I.

This Section 36 did not pass to the State of California under the School-land grant of March 3, 1853, because it is mineral land.

On this point I could make no argument, that

would not seem to be borrowed from the exhaustive analysis of the question made by my learned associate, Mr. Wilson, in the Court below. To him I refer the Court for our views on the question whether mineral land passes to the State by the school-land grant.

But I desire now and here to protest against the assumption that this case necessarily turns on that question.

I understand this case to have been advanced on the calendar (the gentleman appearing for defendant on the motion to advance had no authority so to appear), upon the statement that said question is *necessarily* involved in this case. That it *may* be decided herein is undoubtedly true; but there are two other grounds upon which the judgment of the Circuit Court was based, which, in my opinion, are, if possible, more conclusive than this.

II.

Before the grant to the State, of the sixteenth and thirty-sixth sections in each township, could attach to this particular section in controversy, a right had accrued to the corporation defendant to enter at the proper U. S. Land Office, and thereupon to receive U. S. mining patents for, its mining claims now occupied by it,—parcel of the demanded premises; which right, by the subsequent entry of said mining claims by said defendant and the issuance to it of United States patents therefor, has ripened into a perfect title. This, without reference to the exception to said grant made by Section 7 (hereinafter cited) of said Act of March 3, 1853, making the school-land grant.

1.

There is no Section 16 *or* 36 *in any particular*

township (and consequently no subject matter for the grant to operate upon in such township) until its subdivision, by United States survey, into sections. The establishment of section lines by such survey is an act, not merely of designation, but of creation.

In October, 1865, the Supreme Court of the State of California—Mr. Justice Rhodes announcing its decision—held, in

Robinson v. *Forrest*, 29 Cal. 217,

that "even after a principal meridian and base "lines have been established, and the exterior "lines of the township have been surveyed, "neither the sections nor their subdivisions can "be said to have any existence, until the town- "ship is subdivided into sections and quarter "sections by an approved survey. *The lines are "not ascertained by the survey, but they are created.*" In

Middleton v. *Low*, 30 Cal. 596,

the same court says emphatically that "there is no such tract of land as" N. W. $\frac{1}{4}$ Sec. 36, etc., (so described in the petition for *Mandamus*) "un- "til it has been located within the Congressional "township by an actual survey and establish- "ment of the lines under the authority of the "United States and the survey has been ap- "proved by the proper U. S. Surveyor General."

2.

The grant of "Sections 16 *and* 36 *in each township," eo nomine, could not attach to any particular tract of land, until it should become such section* 16 *or* 36.

We have supposed it to be elementary learning, that a grant cannot take effect until the subject matter thereof shall be in existence.

"So as in every grant, there must be a grantor, a grantee, and a thing granted."
2 Black. Com. 296.

In all stages of this litigation—before every tribunal that has had jurisdiction of its subject matter—the State claimant has, by his counsel, undertaken to answer this fundamental proposition by the cry that the school-land grant is "a present grant;" and authorities are cited by the score to maintain the proposition that the words "shall be and hereby are granted" constitute "a present grant."

Undoubtedly they do, in the sense, that no further act of the granting power is necessary to pass the title to the thing granted, when it shall be in existence.

Undoubtedly these words, applied to an existing subject matter, would at once pass the title thereto.

Our contention is, only that even these words cannot take effect if there be in existence no subject matter for them to lay hold upon. Is not that elementary? We are so clearly of opinion that it is an axiom that we leave the question to stand upon this mere statement rather than argue it.

The State claimant, by his counsel, has, in the various departments of the U. S. Land Office, as well as in the U. S. Circuit Court, cited a long list of cases, claimed to be to the point, that this school land grant attached at the instant of its passage (*eo instante* is the favorite phrase, repeated over and over with great *gusto*) to all land in California, although then unsurveyed, and far distant from any survey, which should, upon survey by the United States, subsequently be embraced within a section 16 or 36.

We do not find in the whole list one single case

which seems to us to sustain, or to tend to sustain, so monstrous a proposition.

They are generally cases arising under the grant of swamp lands, which lands were in existence and were "swamp lands," and known as "swamp lands," when the granting act passed. So there was, at the instant of the passage of the granting act, a subject matter of the grant to which it could attach.

Some of the cases were to the effect that the words "shall be granted" (without any "hereby are") were words of present grant in such sense that no further action of the law-making power was necessary to pass the title. These seem to strip the words "and hereby are" of the magic force attributed to them by counsel, whereby they are claimed to pass the property in what does not exist.

The cases cited before the Secretary of the Interior to this point are by him thoroughly discussed and analyzed in the decision which is laid before your Honors, and his view of them coincides so thoroughly with my own, that it would be an act of supererogation for me to discuss them farther.

In the Circuit Court some new authorities were cited, but so remote from the question that they hardly need to be noticed. Among them I find *Ballance* v. *Tesson*, 12 Ill. 326, in which defendant claimed under a pre-emption entry of a quarter section, embracing the demanded premises, and a U. S. patent issued thereon, bearing date January 24, 1838, expressly made, "subject, however, "to the rights of any and all persons claiming "under the" Act of Congress of March 3, 1823 (p. 786, vol. 3, Stat. at Large), granting to settlers town lots in Peoria.

The plaintiff claimed under a U. S. patent, dated June 29, 1846, issued under the Act above

cited. A previous Act of Congress (of May 15, 1820) had provided for the claimants of town lots in Peoria to file in the U. S. Land Office a notice of their several claims, with a description of their respective lots. The Act of March 3, 1823, says "there is hereby granted to" each such settler the lot so claimed and occupied by him, and provides for a U. S. survey of the lots so claimed, and the issue of patents to the claimants for their respective lots. The claim filed by plaintiff described the lot claimed by him by its boundaries, and the plat of the survey showed its location and boundaries. Of course the Court held that the lot in question was so *reserved* by these proceedings, that the defendant's patent (expressly made subject to these claims) did not convey the lot in dispute, and that it was conveyed by the subsequent patent to plaintiff, which related back to the survey.

Certainly it cannot be claimed that this case is analagous to that at bar.

In *Dequindre* v. *Williams*, 31 Ind. 444, a section of land granted by treaty, to be located under the direction of the President, was held a present grant, *taking effect as soon as located.*

Most of the other cases cited by counsel are those wherein it is held, that the title to swamp land granted to the several States by Congress passed by the grant itself, without patent, and cannot be recalled by Congress. These cases are

Lee v. *Summers*, 2 Oregon, 200;
Busch v. *Donohoe*, 31 Mich. 48,

(which hold that the swamp lands grant to Michigan operated as a conveyance without a patent, and took effect so as to vest the title in the State, "where the lands were properly

identified by the lists thereof made by the "Secretary of the Interior");

Fore v. *Williams*, 35 Miss. 533,

(holding patent not necessary to vest in the State, title to swamp lands granted by Congress, but saying nothing as to time of the title so vesting,)

Dart v. *Hercules*, 35 Miss. 395,

(holding that said granting act "fully vested the "legal title of such lands as were selected and "appropriated under its provisions, in the "State");

Funston v. *Metcalf*, 40 Miss. 504,

(holding that "without such approval by the "Secretary of the Interior, expressly appearing "in evidence, or by necessary inference from a "patent to the State, no title vested in the State "thereto, and none could be conveyed to the "plaintiff below,"—claiming under State patent);

Fletcher v. *Pool*, 20 Ark. 100;
Allison v. *Halfacre*, 11 Iowa, 450;
Branch v. *Mitchell*, 24 Ark. 431,

all holding that the title to the swamp land granted to a State, vested at once by force of the grant, wanting only selection and patent, to fix the location and description; and

Supervisors &c., v. *Burchell*, 31 Ill. 68, (holding only that the swamp land grant was absolute, and not upon condition that the lands should be reclaimed.)

With none of these cases have we any quarrel. In all of them the *specific land* was granted; whether the grant were of swamp or overflowed land, or of land designated by some other description. In every case the subject matter of

the grant was in existence at the time of the grant. In most of the cases decided, the Court went no further than to say that under the swamp land grant, no United States patent was necessary to convey to the State the title of the United States; the granting Act alone being sufficient for that.

The grant in the case at bar is of "*sections sixteen and thirty-six*," which sections have and can have no existence until survey, and which, (from the fractional nature of a township—or from the land, which would otherwise have formed such section, being included in a Spanish grant— or from a change in the method of survey,) *may never have* an existence, in any particular township.

Counsel's assumption would probably be correct, if the grant, (in case of a township whose exterior lines were already surveyed, but its section lines not established when the Act was approved) had been of "a tract of land one mile "square in the southeast corner" of such township, instead of being of "section 36," in such township.

The grant would then be of a specific tract of land sufficiently described, and would, of course, take effect immediately. The survey of the lines, and establishment of the corners in the field would be necessary, only to designate, *in pais*, the precise location of the land granted; not to give effect to the grant.

But where the grant is of "section 36," it is self-evident that it cannot take effect until there shall be such "section 36."

The survey, as we have shown, does not merely *designate* the section; it *creates* it.

And this is the reason why the cases do not apply, in which the lands granted had merely to be designated. In

Cooper v. *Roberts*, 18 How. 173,

the Supreme Court of the United States says, (p. 179) in a case arising under the grant of section 16 in each township in the State of Michigan for school purposes:

"We agree, that until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach, and if there is no legal impediment, the title of the State becomes a legal title. The *jus ad rem* by the performance of that executive act becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others." In

Grogan v. *Knight*, 27 Cal. 515,

the Supreme Court of the State of California says, (p. 521) "the State did not, by virtue of that Act, acquire the title to any specified tract of land, and could not acquire it, until the survey had been made under the authority of Congress."

This was a case of lands to be selected *in lieu* of sections 16 and 36, which the State had failed to get. But in

Middleton v. *Low*, 30 Cal. 596,

the same court, in terms, applied the same rule to sections 16 and 36. Alluding to *Grogan* v. *Knight*, the Court say (pp. 604–5):

"The reasons operating to prevent the State or "her vendee from acquiring a title by the aid of "a selection made, as in that case, before the "congressional survey, are equally cogent to "show, that title to any particular parcel of the "land granted for the purposes of the public "schools, does not vest in the State until such "survey has been made.

"*There is, in fact, no such tract of land as that "described in the petition, until it has been located "within the congressional township, by an actual sur-"vey and establishment of the lines, under the author-"ity of the United States, and the survey has been "approved by the proper United States Surveyor Gen-"eral.* A person may approximate to the lines "that may be run — may surmise the precise "lines—but the tract has no separate legal iden-"tity until the survey is made and approved un-"der the authority of Congress."

Congress has taken the same view of this question in enacting the Act of February 26, 1859, entitled "An Act to authorize settlers upon six-"teenth and thirty-sixth sections, who settled "before the surveys of the public lands, to pre-"empt their settlements."

11 U. S. Stat. at Large, 385.

If the title to the land thereafter to be included in sections 16 and 36 passed to the State at the time the granting act was approved, how could Congress (as it assumed to do by the act last above cited), give to pre-emption settlers before survey, the right to enter after survey, sections 16 and 36, so settled upon by them; giving the State other land in lieu? If the State right had vested as soon as the granting Act passed, the land could not be given to pre-emption set-

tlers and taken from the State by the above cited act.

Yet the Land Department of the Government of the United States, and of the State of California have always treated this Act of February 26, 1859, as giving pre-emption settlers on sections 16 and 36, before survey, the right to enter the land so settled upon by them, and as compelling the State to take other land in lieu.

So, the position which we maintain—(that the State gets no title whatever to, or lien upon, any land, under the school-land grant until such land is surveyed by the United States) is sustained by reason and authority;—by the decisions of the highest Court of the State interested;—by the practice of the executive officers of both parties interested—State and Nation;—by the decisions of the Register and Receiver,—of the Commissioner of the General Land Office,—of the Secretary of the Interior,—and of the Circuit Court of the United States in this very case;—and finally by the action of Congress.

As well might a pre-emptor claim that his title (upon issue to him of a patent from the United States) related back to the pre-emption Act of September 4, 1841, as for the State of California, or its grantee, to claim that the State title to Section 16 or 36, upon survey, relates back to the school-land grant of March 3, 1853.

3.

Before the survey into sections of the township in which the demanded premises are embraced, the defendant had acquired a right to enter at the proper U. S. Land Office, and to receive an U. S. patent for its mines, parcel of said premises; and the patents for said mines subsequently issued to the defendant by the United States, relate back to the United States statute

"The reasons operating to prevent the State or "her vendee from acquiring a title by the aid of "a selection made, as in that case, before the "congressional survey, are equally cogent to "show, that title to any particular parcel of the "land granted for the purposes of the public "schools, does not vest in the State until such "survey has been made.

"*There is, in fact, no such tract of land as that "described in the petition, until it has been located "within the congressional township, by an actual sur-"vey and establishment of the lines, ander the author-"ity of the United States, and the survey has been "approved by the proper United States Surveyor Gen-"eral.* A person may approximate to the lines "that may be run — may surmise the precise "lines—but the tract has no separate legal iden-"tity until the survey is made and approved un-"der the authority of Congress."

Congress has taken the same view of this question in enacting the Act of February 26, 1859, entitled "An Act to authorize settlers upon six-"teenth and thirty-sixth sections, who settled "before the surveys of the public lands, to pre-"empt their settlements."

11 U. S. Stat. at Large, 385.

If the title to the land thereafter to be included in sections 16 and 36 passed to the State at the time the granting act was approved, how could Congress (as it assumed to do by the act last above cited), give to pre-emption settlers before survey, the right to enter after survey, sections 16 and 36, so settled upon by them; giving the State other land in lieu? If the State right had vested as soon as the granting Act passed, the land could not be given to pre-emption set-

tlers and taken from the State by the above cited act.

Yet the Land Department of the Government of the United States, and of the State of California have always treated this Act of February 26, 1859, as giving pre-emption settlers on sections 16 and 36, before survey, the right to enter the land so settled upon by them, and as compelling the State to take other land in lieu.

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of July 26, 1866, *legalizing the occupation of mineral lands by miners, and authorizing the issue of patents for such lands so occupied.*

The findings show that the defendant's grantors located the "Spring Hill" Mine in 1851, the "Keystone" in 1853, and the "Geneva" in 1863, these three mines embracing the ground now patented to defendant. It appears also that these locations were made in accordance with the then existing rules of the mining district and the customs of miners; that the original locators and their grantees have held undisturbed possession of the premises from the date of location, and that defendant held this possessory title at the time of its application to the United States for patents.

So the mining Act of July 26, 1866, found these lands unsurveyed claimed by the grantors of defendant, who had "previously occupied and "improved the same according to the local cus-"tom or rules of miners in the district."

(Section 2, Act of July 26, 1866.)

That defendant and its grantors performed all the acts required by the statute to entitle defendant to its patent for these mines, the patents themselves, in evidence in this case, *conclusively* prove.

Doll v. *Meador*, 19 Cal. 195, p. 325.
Leese v. *Clark*, 18 Ib. 535, p. 572.
Teschemaker v. *Thompson*, Ibid 27.
Waterman v. *Smith*, 13 Ib. 420,

and a host of other cases, which need not be cited.

At the moment of the passage of the Act above cited, the right of the defendant's grantors to purchase, enter, and receive a patent from the United States for these mines, attached to and became a lien upon the mines.

The "vein or lode of quartz or other rock in "place, bearing gold," claimed and occupied by defendant's grantors, was then in existence, for their claim and their right to lay hold upon.

Section 36, in township 7 north, of range 10 east, Mt. D. M., was not then, nor until October 7, 1870, (the date of filing the township plat in U. S. Land Office), in existence. So the school-land grant, which was, *inter alia*, of "section 36 in each township," had not attached to any of this land at the date when the mining claim attached thereto.

The right of the mining claimant having once attached, could not be overridden or detached from the land by the subsequent survey, which *might* otherwise have given the State a valid claim to the section under the school-land grant, by creating a subject matter for said grant to lay hold upon, if not cut off by reason of the mineral character of the section, or settlement thereon.

Upon the issuance of the United States patent to the mine claimants, the title conveyed thereby related back to the first occupation and claim of the patentee and its grantors, under said Act of July 26,1866.

> *Ross* v. *Barland*, 1 Peters, 655, affirmed in *Bagnell* v. *Broderick*, 13 Ib. 436.
> *Smith* v. *Athern*, 34 Cal. 536, pp. 511–512.
> *Megerle* v. *Ashe*, 33 Ib. pp. 74, 85.

The rule, as laid down in *Ross* v. *Barland*, cited *ante*, as taken from the Courts of Mississippi, whose rule of practice in that regard is like that of the Courts of California, is, that the law courts will "look beyond the grant, and examine the "progressive stages of the title from its incipient "state, whether by warrant, survey, entry, or "certificate, until its final confirmation by grant, "and if found regular and according to law in

" these progressive stages, the grant is held to " relate back to the inception of the right, and " to have dignity accordingly."

So, the conclusion cannot be avoided, that, until survey by the United States, that government had full power to dispose of the land embraced in the demanded premises;

That while it had this power, the United States, by the Act of Congress of July 26, 1866, gave miners the right to locate mining claims on the public lands, whether surveyed or unsurved, to make improvements thereon, and to obtain U. S. patents therefor;

That this Statute found the defendant occupying, working and claiming its mines within the demanded premises, and with the right to go on and perfect its claims thereto under said Statute, until they should ripen into a perfect patent title; no matter whether such patent should issue before or after the township survey into sections;

That the sectionizing of the township (which first could enable the State claim to attach to this section 36,) did not and could not avail to root out defendant's equities already attached under said mining statute;

That defendant did go on, (contested at every step by the State and those claiming under it,) and before the Register and Receiver of the local U. S. Land Office,—the Commissioner of the General Land Office,—and the Secretary of the Interior established its right to U. S. patents for its mines, and in July received its patents therefor;

That said patents relate back to the inception of defendant's legal claim to enter upon and pre-empt said mines,—to-wit: the date of the Act of Congress opening mineral lands to pre-emption—July 26, 1866;

That said inception of defendant's mining claim and right to pre-empt its mines, antedating the time when, upon U. S. Survey,—the State's claim *could* first attach, (Oct. 7, 1870,) defendant's patents, so relating back to such inception, overreach and cut out the State patent, of earlier date, under which plaintiff claims.

All this without reference to the exceptions contained in the school land granting Act, through which the State's alleged title is sought to be deraigned.

See also on this poiint

Heydenfeldt v. *Daney G. M. Co.*, 93 U. S. 634.

We will now show that, without this, the State never acquired title to the section 36 in question, by reason of the case coming, in terms, within an exception to the grant, made by the granting Act itself.

III.

The State of California never acquired any title to the Section 36, embracing the demanded premises, by reason of its being excepted by the terms of the Act of Congress of March 3, 1853, from the general (school land) grant of Sections 16 and 36 therein contained.

1.

The settlement alluded to in the first clause of said Section 7 need not be a settlement, made by authority of any law. It is not so provided in the statute itself, and there is nothing in the then existing condition of things to create a presumption that such a requirement was intended.

The whole act must be construed together.

The grant to the State of "Sections 16 and 36, "which shall be and hereby are granted to "the State for the purpose of public schools, "in each township" is found in section 6. That section contains no further allusion to the school land grant—being entirely devoted (with the exception of the clause above quoted) to opening to pre-emption the public lands, whether surveyed or unsurveyed—with the exceptions and limitations specified.

The next section (7) makes the following exceptions to the school land grant made by section 6:

"Sec. 7. *And be it further enacted*, That where "any settlement, by the erection of a dwelling "house or the cultivation of any portion of the "land, shall be made upon the sixteenth and "thirty-sixth sections, before the same shall be "surveyed, or where such sections may be re-"served for public uses, or taken by private "claims, other land shall be selected by the "proper authorities of the State in lieu thereof."

The section further specifies the act under which such indemnity selections shall be made.

It is apparent upon the most casual inspection, —nor is this impression weakened by the most careful examination and comparison with the rest of the act—that more sweeping words in regard to the settlement which shall take a section sixteen or thirty-six out of the school land grant (so it be by building a house or cultivating land) could not be used. The language is:

"Where ANY settlement, by the erection of a "dwelling house, or the cultivation of any por-"tion of the land, shall be made upon the six-"teenth and thirty-sixth sections, before the same shall be surveyed, * * * * "* * * * * other land shall be

" selected by the proper authorities of the State " in lieu thereof."

As to the person by whom such settlement may be made, there is no limitation.

The act does not require that such settlement should be made by a pre-emptor, a town-site settler, a miner, or a person belonging to any particular class; it does not require that the settlement should even be made under the protection or authority of any law. If it be ANY settlement (so it be made by erecting a house or cultivating land) which is made before survey, on land proving upon survey to be in a sixteenth or thirty-sixth section, that section is not to pass to the State under the school land grant; it remains the property of the United States. and the State must take other land in lieu thereof, to be selected under the Act of Congress of May 20, 1826.

Can language be plainer? With the law so plain. and the facts admitted by stipulation, can it be difficult to determine whether the section 36 in question comes within this exception? There would seem to be no room for controversy; yet the whole contention of plaintiff is to show that in spite of the admitted settlement of hundreds of people on the town site included in the demanded premises. from 1851 to the present date,—in spite of the cultivation of the 25 or 30 acres of the Key stone-Field for six years next before survey,—in spite of the mines located and operated ever since 1851 upon the demanded premises,—in spite of the patents issued by the United States, after long and patient investigation of the whole matter by its officers, for the town site of Amador City, occupied by 400 to 500 inhabitants, and for the "Bunker Hill," "Original Amador," and other mines,—those of defendant among the rest

(those patents covering almost the whole of the demanded premises,)—that, in spite of all these things, there was not "*any settlement*" by the erection of dwelling houses, or cultivation of any of the land upon this section before survey!

It was manifestly the object of Congress in enacting this section simply to retain in its own hands complete control of all settlements on the public lands. It was certain that settlement would run far ahead of the surveys, so that settlers desirous to avail themselves of the pre-emption laws, might, before survey, unwittingly locate themselves, and make improvements upon land which would prove upon survey to be upon a section 16 or 36.

Sherman v. *Buick*, 3 Otto 209, (p. 213).

Or a mining claimant might build his house on such land;—or a mining town (as in the case at bar) might spring up on such tract before survey. In either such case, Congress seems to have been impressed with one idea;—that no such settler, whether he had warrant of law for his location or not,—should be left to the tender mercies of the State, or of a purchaser from the State. His house, his home, his cultivated tract,—whether a garden patch or a field,—should not pass under the control of another power. The same government which had hitherto given to actual settlers their homesteads on the public domain, at a nominal price, would still keep in its own hands the power to dispose of the land so settled upon, which, on survey, should fall within any section 16 or 36,—giving to the State of California, under the school-land grant, other land in lieu of that so settled upon, so that the State would lose nothing by the exception.

Was it not a paternal,—a humane policy, consistent with all previous congressional legislation in regard to settlers on the public lands?

What the settlers' rights should be in respect to such lands, it left to be determined in the future. Subsequent legislation has dealt liberally with them.

By this same Act (section 8), town-sites, not on mineral lands, were made subject to entry, for the benefit of the inhabitants thereof, under the town-site law of May 23, 1844.

Where the town-site (as in the case at bar) was on mineral lands, the inhabitants were granted (by the same section) "the right of occupation "and cultivation only, until such time as Con- "gress shall dispose of the same."

By the Acts of Congress of July 1, 1864, and the Act of March 3, 1865, supplemental thereto, as also by the town-site Act of March 2, 1867. and that of June 8, 1868, amending the same, inhabitants of town sites upon mineral lands were placed in the same category with the citizens of other towns, and the privilege was granted to them of purchasing from the general government the town lots on which they had made their homes.

By the Act of Congress approved February 26, 1859, Congress made provision for settlers before survey, with a view to pre-emption, on sections 16 and 36, by giving them the privilege of pre-empting the land so settled upon by them.

By the same Act, it gave to all the States which might, by such pre-emption, lose such sections 16 or 36 previously reserved or pledged to them for the use of schools or colleges,—the same indemnity which California obtained by section 7, hereinbefore quoted and discussed, of the Act of March 3, 1853;—allowing such States to select "other lands of like quantity" in lieu of those thus pre-empted by settlers.

This Act relieved those settlers who, under the Acts opening the unsurveyed public lands in

Minnesota, Nebraska and Kansas, to pre-emption had by accident gone upon lands proving upon survey to be in section 16 or 36.

The Act of May 30, 1862, again opened to pre-emption the unsurveyed public land in California, and that of June 2, 1862, extended the pre-emption privilege to all unsurveyed land of the United States; so that under these Acts (with the aid of that under discussion here, and that already cited, of Feb. 26, 1859,) the pre-emption settler upon unsurveyed land, was made secure in his home, even if his settlement should fall upon a section 16 or 36, when survey should be made.

This subsequent legislation of Congress throws a flood of light upon the intention of that body in enacting section 7, of the Act of March 3, 1853. We are not compelled to merely infer its intention from the section in question, if the words could be deemed doubtful; we have the subsequent action of Congress carrying out the intention which seems to us apparent in the Statute itself. Having reserved the land until a policy should be deliberately settled upon as to its final disposition, Congress, at its leisure, has provided, as I have shown, for disposing of all lands, proving on survey to be within section 16 or 36, settled upon before survey, to the settlers who have made their homes thereon.

As already shown, town-site settlers (making settlement by the erection of dwelling houses), were already enabled to get title under the town-site Act of March 23, 1844, unless the lands were mineral. If mineral, they could not do this until the enactment of the Act of July 1, 1864, hereinbefore cited.

To mining claimants, relief was extended by the Act of July 23, 1866, cited *ante*,—while earlier still—Feb. 26, 1859—and subsequently, by the Acts of May 30, and June 2, 1862, the

pre-emption settler was relieved from his uncertainty as to his ability to obtain a valid title.

2.

The settlement which should, if made before survey, except a section 16 *or* 36 *from the school land grant, need not be one made by authority of the same act. It grants no right of settlement; but only excepts from the school land grant lands settled on before survey.*

In accordance with this view is the decision of the Supreme Court of the United States in

Sherman v. *Buick*, 3 Otto 209,

in which, as is well known, the fight in U. S. Supreme Court, was in fact between the parties in interest in the case at bar, contending for a principle, involving the title to the immense property here in dispute, and not merely between a State claimant and a U. S. pre-emptor, for a paltry 40-acre tract, worth perhaps a thousand or two dollars, as would seem by the record of the case.

In that case the most desperate efforts were made to get from the United States Supreme Court a decision affirming that of the California Supreme Court, to the effect that no settlement, before survey, proving upon survey, to be within a section 16 or 36, would, by virtue of section 7, of the Act of March 3, 1853, take such section out of the school land grant to the State of California—unless such settlement were made under the grant of pre-emption privileges contained in section 6, of the same Act.

In argument in that case, the counsel for defendant in error (as appears by the report of the case, at pages 210 and 211) argued further, just as counsel for defendant does in the case at bar,

that the title to the land, proving upon survey to be in section 16 or 36, passed to and vested in the State *in presenti*, at the date of the approval of the act, even though the land were then unsurveyed.

The court cut up this doctrine, root and branch, and sustained the title of the plaintiff (a pre-emption settler, whose settlement was made Dec. 20, 1862, nearly four years before survey, under the pre-emption act of May 30, 1862) resting upon a United States patent, issued to him as such pre-emptor May 15, 1869, over three years after survey:—the defendant resting on his patent from the State of California, issued Jan. 1, 1869, to him as the purchaser from the State of California of a portion of a section 36.

That case seems to us to be conclusive of the case at bar, in principle.

It was claimed in the court below that the force of that decision was broken by the decision of this court in

Natoma W. & M. Co. v. *Bugby*, 6 Otto 165.

Of this case it is enough to say, that it does not apply to the case at bar.

In that case Bugby sued the corporation plaintiff to recover possession of a portion of a section 16, for which the State of California had issued a patent to him.

The defendant did not in any manner connect itself with the United States, though claiming, as a ditch owner, under the Act of Congress of July 26, 1866 (hereinbefore cited) "granting the "right of way to ditch and canal owners over "the public lands, and for other purposes."

The U. S. survey of the land in controversy was completed May 19, 1866, and the plat filed in the U. S. Land Office June 16, 1866:—one month before the passage of the Act of July 26,

1866, invoked as granting to defendant his right of way!—So,—unless the section were shown reserved in some way from the school land grant to the State, the title thereto vested in the State upon survey made, and the subsequent Act of Congress could not operate to give defendant a right of way for its ditch or canal, over land already the property of the State.

It was sought to show that the section was reserved from the school land grant, under section 7, so often hereinbefore cited,—by reason of settlements made thereon by plaintiff and others before survey.

But it was shown that these settlers made no claim to enter the land by pre-emption within the three months after survey prescribed by the U. S. pre-emption laws for the filing of declaratory statements by pre-emption settlers on unsurveyed lands; except in the case of one Hancock, who did so file, but afterwards abandoned his claim. By allowing that time to elapse without such filing, these settlers were held by the court to have abandoned their claims and surrendered their rights to this land. The settlements made were those of pre-emptors only,—and so the court says (as cited by counsel, page 6 of his brief) "as against all the world except the pre-" emption settler the title of the United States " passed to the State upon the completion of the " surveys; and if the settler failed to assert his " claim or to make it good, the rights of the State " became absolute."

If the settlers had been miners, or town-site occupants,—the court would have said that upon survey the title passed " as against all the world " except the" miner and the town-site settler; and if the miner, or town-site settler " had failed " to assert his claim or to make it good," the

court would in that case have held that "the "rights of the State became absolute."

But here is just the difference between the two cases. While in the case cited, the settlers before survey abandoned their claims based upon their settlements,—in the case at bar, the settlers before survey,—both town-site occupants and mine-owners, have asserted, insisted upon, pressed, proved, maintained, and made good their claims.

After a vigorous and bitter fight extending through two and a half years (from Jan. 6, 1871, to the issuing of the patents in July, 1873) in the U. S. Land Office at Sacramento,—before the Commissioner of the General Land Office,—and the Secretary of the Interior, the decisions at every step being in favor of the town-site and the mines,—the final decision of the Land Department of the United States is rendered in favor of all the settlers before survey on the demanded premises (E. $\frac{1}{2}$ of Sec. 36, T. 7 North, R. 10 East, M. D. M.) and patents, covering almost the whole of the demanded premises, have been issued by the United States for the Town Site of Amador City, and for the following mines:

"Original Amador,"
"Bunker Hill,"
"Last Chance,"
"Nevada,"
"Eclipse,"
"El Dorado."

The justice of the decision cited is manifest. Holding, as I have maintained throughout this brief, that the reservation of sections 16 and 36, settled upon before survey, is made out of tender regard for the settlers,—what possible reasons could be given for holding such sections excepted from the grant, when the settlers,—for whose benefit alone the exception is made,—have them-

selves abandoned all claim under such settlements, and sought to get title under the State.

Ratione cessante, cessat lex. The exception in section 7 is made for a purpose—to protect the rights of settlers. When those settlers themselves abandon and surrender their rights, what is there to be protected? There is no longer any settlement.

But in the case at bar, the settlers have vigorously insisted upon and defended their rights, and the United States, whether represented by its law-makers or its courts, has not the power, as it certainly cannot have the desire, to abandon and betray them.

I dismiss the case cited therefore, without further discussion, as entirely inapplicable to the case at bar, in the view in which it is presented by counsel for plaintiff.

But there is another feature in that decision, to which I must not fail to call the Court's attention, as thoroughly maintaining my position, that the claim of defendant to its mines under the Mining Act of July 26, 1866,—attached before survey, and could not be taken from them by the fact that on survey by the United States, their mines proved to be in Section 36.

In *Natoma W. & M. Co.* v. *Bugby*, as cited by counsel at page 6 of his brief, the court says,—(after quoting the provisions of Section 9, of the Act of July 26, 1866, already cited so often by me,—said section maintaining and protecting possessory water rights, and giving the right of way therefor over the public lands)—" the " company has brought itself within the provi- " sions of this section, if, at the time of the " passage of the Act, the United States held title " to the lands."

" On the 22d of April, 1867, Bugby purchased

" the portion of the section on which the premi-
" ses in controversy are situated, from the State
" of California, and took a patent. The company
" does not, in any manner, connect itself with
" this title or with that of any other occupant of
" the section previous to the survey.

" In *Sherman* v. *Buick*, 93 U. S. 209, it was
" decided that the State of California took no
" title to sections 16 and 36, under the Act of
" 1853, as against an actual settler, before the
" survey, claiming the benefit of the pre-emption
" laws, who perfected his claim by a patent from
" the United States. In such a case, the State
" must look for its indemnity to the provisions
" of section 7 of the Act. As against all the
" world, except the pre-emption settler, the title
" of the United States passed to the State, upon
" the completion of the surveys, and if the set-
" tler failed to assert his claim, or to make it
" good, the rights of the State became absolute.
" The language of the Court is, (p. 214.) " These
" things (settlements and improvements under
" the law) being found to exist when the surveys
" ascertained their location on a school section,
" the claim of the State to that particular piece
" of land was at an end; and it being shown, in
" the proper mode, to the proper officer of the
" United States, the right of the State to the
" land was gone, and in lieu of it, she had ac-
" quired the right to select other land agreeably
" to the Act of 1826."

" In that case the contest was between the
" settler who had perfected his title from the
" United States, and a purchaser from the State."

" Here the Company does not claim under the
" settler's title, but seeks by means of that to de-
" feat that of the State, and thus leave the land
" in a condition to be operated upon by the Act

" of July 26, 1866. The settler, however, was " under no obligation to assert his claim, and he " having abandoned it, the title of the State be- " came absolute *as of May* 19, 1866, *when the sur-* " *veys were completed.* The case stands, therefore, " as if at that date the United States had parted " with all interest in and control over the " property.

" As the Act of July 26 was not passed until " after that time, it follows that it could not " operate upon this land in favor of the Company."

It will be seen, that the court would have held the school section in controversy to have been United States land when the Act of July 26, 1866, passed, if only the settlers thereon before survey had gone on to perfect their pre-emption rights; that said court,—the Supreme Court of the United States,—did hold in the case cited, that, on the abandonment of their pre-emption rights by said settlers, the title of the State vested,—not as of the date of the passage of the school land grant Act of Congress of March 3, 1853,—as counsel maintains in this case,—but " *as of May 19th*, 1866, *when the surveys were com-* " *pleted.*"

By the same rule, the title of the State to the premises now in controversy, could not vest,—if at all,—before the U. S. survey in 1870.—Years before that time the rights of defendant had attached to the land under the Act of July 26, 1866, as we have shown,—which have subsequently ripened into a perfect title by the patents in evidence. In citing the case so relied upon by counsel for defendant he is " hoist by " his own petard."

3.

But this is not a case for argument. The question can be determined by the Court by mere inspection.

The photographs A and B, forming part of the record, are the testimony of a witness who cannot be bought and who will not lie; of the sun in the heavens, who shows us by the photographs, what settlement there was on this land before survey.

We ask the Court to give one look at these exhibits, and then say whether "any settlement, by the erection of a dwelling house," was made on this land when the views were taken.

4.

The Supreme Court of California, in a similar case, lays down the precise rule which I invoke in this case.

The case cited is

Wedekind v. *Craig*, Vol. VI, Pacific Coast Law Journal, p. 105.

The decision is printed in full as an appendix to this brief.

IV.

If title to the demanded premises did vest in the State of California, on the date of the school land grant Act, March 3, 1853,—(as claimed by counsel for plaintiff),—plaintiff's claim is barred by the Statute of Limitations.

By Section 315 of the Code of Civil Procedure, the State bars itself from the right to commence suit in respect to any real property by reason of

its rights or title thereto, unless such right or title accrues within ten years before any action or other proceeding for the same is commenced.

This operates as a continuation of the previous statute on the same subject (Sect. 3, act of April 22, 1850:—Hitt. Dig. § 4345) under § 5 Code Civ. Procedure.

Sect. 316 of Code Civ. Procedure provides that patentees of the State are bound by Sect. 315, whenever the State would have been, if it had issued no patent.

This is the *Charybdis* upon which plaintiff must be wrecked, if he could induce the Court to adopt the doctrine of "a present grant," put forth by his counsel, to avoid the *Scylla* of a correct construction of the school land grant, as laid down by the United States in "*Cooper* v. *Roberts*," and "*Heydenfeldt* v. *Daney G. & S. M. Co.*," cited *ante*.

He has no escape from the dilemma thus presented. If the State's title to this section 36 could not vest until survey, as we (and the Supreme Court of the United States) maintain, then *defendant's* title had attached years before:—to wit, on the passage of the Act of July, 1866.

If the State's title vested March 3, 1853,—the ten years necessary to bar the State or its grantees, had twice elapsed before this suit was brought.

Plaintiff cannot say that its equitable title vested at the passage of the Act of Congress, and that his subsequently acquired legal title relates back to it;—and so liken it to the case of a Mexican grant,—in regard to which the statute does not begin to run until the patent issues. In this case no patent issues. The United States have done no act tending to constitute a grant of this land, since or except the enactment of the school land grant. Whenever, and of course not till then,—this grant attached (if ever) to these

premises, the legal title vested. There is not required to be even a listing over of sections 16 and 36. They pass, whenever they do pass, by the mere force of the granting act.

RESUMÉ.

The end of the whole matter is, then, that

First. Under the school land grant contained in Section 6 of the Act of Congress of March 3, 1853, no title to any section 16 or 36 could vest in the State until survey.

Natoma W. & M. Co. v. *Bugby;*
Cooper v. *Roberts;*
Sherman v. *Buick;*
Robinson v. *Forrest;*
Middleton v. *Low.*

Secondly. Years before survey, under the water right and mineral land act of Congress of July 26, 1866, an inchoate right of defendant, then holding the possessory title, to enter, and receive U. S. patents for its mines,—parcel of the demanded premises,—attached to its said mines, being then in unsurveyed land of the United States.

Thirdly. Said inchoate rights having so attached, were not, and could not, be taken from defendant by the said mines proving on subsequent survey to be included in a section 36.

Fourthly. By the mining patents issued to defendant by the United States, in July 1873, the said incohate rights of defendant ripened into a perfect title to said patented mines, relating back to the first attaching of its legal claim, at the passage of the Act of July 26, 1866.

Fifthly. Under Section 7 of the Act of March 3, 1853, the demanded premises (E. $\frac{1}{2}$ Sect. 36, T. 7 North, R. 10 East, M. D. M.) were excepted

from the general grant to the State of California of Sections 16 and 36 in each township,—settlements thereon having been made before survey by the erection of a townfull of dwelling houses and by the cultivation of a large tract of land, and the rights of the settlers not having been abandoned upon survey, but having been vigorously pressed to title.

Sixth. If plaintiff, or his grantor, the State, ever had any legal claim to the demanded premises, it is barred by the statute.

I owe an apology to the Court for the length of this brief; but the magnitude of the interest at stake would not allow me to take anything for granted, even in a case seeming so plain.

The statutes in force at the time of the purchase by Henry Casey (an historic name in the criminal annals of California) of the State's title to this land, show that he must have paid to the State *four hundred dollars* for the 320 acres of land, including the town-site of Amador City, with the homes of its 400 to 500 inhabitants, besides half a dozen mines on the world-renowned "Mother Lode";—among them some of the most valuable in the State. It is not pretended that he, or the plaintiff,—his grantee,—has any other rights than what he may have acquired by this purchase.

The plaintiff can certainly present no claim to this Court for any consideration beyond that due to his bare legal rights. That the only legal right which he has is to be ignominiously sent out of Court, taking nothing by his action, I think has been clearly shown.

GEO. A. NOURSE,
Attorney for Defendant.

APPENDIX.

GEORGE L. WEDEKIND, APPELLANT,

vs.

WILLIAM CRAIG ET AL., RESPONDENTS.

STATE LANDS—MINERAL LANDS. Plaintiff, by virtue of a patent granted by the State of California, under the act of the Legislature regulating the sale of mineral lands, approved March 28, 1874, cannot maintain title against citizens of the United States who located the premises as mining claims in 1852 in accordance with the local mining regulations and customs, and which have since been held and worked for gold as mining claims. A settlement of this character prevents the title from passing to the State under the provisions of the seventh section of the act of Congress of March 3, 1853.

Appeal from the District Court of the Fourteenth Judicial District, Placer County.

J. P. Dameron, for appellant.
Tuttle & Fulweiler, for respondents.

THORNTON, J., delivered the opinion of the Court:

On the 2d of April, 1878, the plaintiff commenced this action against the defendants to recover the possession of a tract of land situate in the County of Placer, described as the southeast quarter of the northwest quarter of Section 36, in Township 14 north, Range 10 east, of the Mount Diablo base and meridian. Judgment was rendered for defendants. Plaintiff moved for a new trial, which was denied. The plaintiff prosecutes this appeal from the judgment and order denying his motion for a new trial.

The plaintiff claimed title under a patent of the State of California, dated December 23, 1876; the defendants under mining locations made in 1852, which have been occupied ever since, and under a settlement made in 1853 and continued from that date. The Court below found the facts as follows:

1. The plaintiff, on the 3d day of August, 1874, applied to the Surveyor-General of the State of California to purchase the demanded premises under the Act of the Legislature of this State regulating the sale of mineral lands, approved March 28, 1874, and his application was approved by the Surveyor-General on the

11th day of October, 1875, and that said State issued a patent to him on the 23d day of December, 1876. This was plaintiff's title.

2. The demanded premises are in the local mining District called Forest Hill Mining District, and are and have been mineral lands containing gold in gravel placer mining land, and are and have been more valuable for mining than for agriculture.

3. In June, 1852, said premises were located as mining claims, in accordance with the local mining regulations and customs, by citizens of the United States, and have since been held and worked for gold as mining claims by citizens of the United States; and the defendants are such citizens, and have owned, possessed, and worked the same more than ten years last past, and derive their title from the first locators.

4. More than $30,000 has been expended in running tunnels into and developing said claims, and a large amount of gold has been taken therefrom.

5. In the year 1871 the demanded premises and the township in which they are contained were sectionized by the United States in the field, and the plat of survey was filed in the local land office at Sacramento, and approved by the Surveyor-General of the United States for California on the 11th day of November, 1871. That plat of survey showed that the land was returned as mineral land.

6. The defendant Craig, in 1853, settled upon the demanded premises, erected a dwelling-house thereon, and inclosed about four acres of the same, and moved into said dwelling-house, and has since continued to live upon, occupy, and cultivate the same, with his family.

The land in controversy is mineral. The claim of the plaintiff is based upon the Act of Congress of March 3, 1853, passed "to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," and upon a purchase by him from the State of the land sued for under an Act of its Legislature regulating the sale of mineral lands, approved March 28, 1874.

It is urged on behalf of appellant that this land was granted to the State by the Act of Congress of the 3d of March, 1853. Reference is made to the sixth section of that Act. It is contended by counsel for defendant that as the land is mineral land, it is not embraced in the grant made by the sixth section of the Act of 1853.

This question was before the Supreme Court of this State in *Higgins* v. *Houghton*, 25 Cal. 254. It was held in that case that the sixteenth and thirty-sixth sections, though mineral land, passed under this grant—the full title vesting in the State as soon as the township is surveyed and sectionized. But it appears from the findings of the Court in this action that in 1852 the premises

sued for were located as mining claims, in accordance with the local mining regulations and customs, by citizens of the United States, and have been since held and worked for gold as mining claims by citizens of the United States; that the defendants are such citizens, and have owned, possessed, and worked the same more than ten years last past, and derive their title from the first locators; and further, that the defendant Craig, in 1853, settled upon the demanded premises, erected a dwelling-house thereon, and inclosed about four acres of the same, and moved into the dwelling-house, and has since continued to live upon, occupy, and cultivate the same, with his family.

Counsel for defendants contend that the facts found as above stated, by virtue of the provisions of the seventh section of the Act of Congress of 1853, prevent the grant to the State in the preceding section from taking effect. This section (the seventh) provides "that where any settlement by the erection of a dwelling-house *or* the cultivation of any portion of the land shall be made upon the sixteenth and thirty-sixth sections before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the Act of Congress approved on the 20th of May, 1826, entitled 'An Act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for, and which shall be subject to approval by the Secretary of the Interior;' and no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority; nor shall any person obtain the benefits of this Act by a settlement or location on mineral lands."

It clearly appears from this section that the sixteenth and thirty-sixth sections, when any settlement "by the erection of a dwelling-house or the cultivation of any portion of the land" has been made upon such sections prior to the survey of the same, are reserved from the grant to the State, and the State is allowed to select other land in lieu of such sections so settled upon. It is found that such settlement was made in 1853 on a portion of the thirty-sixth section sought to be recovered in this action, and has existed ever since. (See sixth finding.) The township in which the thirty-sixth section sued for is, was not surveyed until 1871. Under such circumstances the title never passed to the State, and the patent issued to the plaintiff is invalid.

It is urged by the plaintiff that the settlement referred to in the section above quoted is that made by a pre-emption claimant, and that it only relates to lands subject to pre-emption; and that inasmuch as the land in dispute was mineral land not subject to pre-emption (as declared in the sixth section), the settlement did

not have the effect to prevent the grant to the State from taking effect.

We cannot concur in the soundness of this view, for the reason that the settlement as defined in the seventh section is different from the settlement required of a pre-emptioner. The settlement of the latter must be by inhabiting and improving the same, and by erecting a dwelling-house thereon (see Pre-emption Act of September 4, 1841, Section 10), whereas the settlement mentioned in the seventh section of the Act of 1853 is by the erection of a dwelling-house, *or* by the cultivation of a portion of the land. (See opinion of the Secretary of the Interior in *Keystone Mining Company et al.* v. *The State of California,* Copp's U. S. Mining Decisions, pp. 109, 120.) Nor in our opinion is the soundness of the conclusion here reached affected by the last clause in the seventh section of the Act of 1853, which is in these words: "Nor shall any person obtain the benefits of this Act by a settlement or location on mineral lands." The meaning of this is that no person shall acquire a title to mineral lands under the provisions of the Act by a settlement or location on such lands. Still, in our judgment, a settlement of the character above stated prevents the title from passing to the State under the provisions of the seventh section.

It follows from the foregoing that the judgment and order appealed from must be affirmed; and it is so ordered.

We concur: MYRICK, J., SHARPSTEIN, J.

OFFICE SUPREME COURT U. S.
FILED
OCT 12 1880
JAMES H. McKENNEY, Clerk.

In the Court of Claims of the United States.

OCTOBER TERM, 1880.

THE IVANHOE MINING CO., PLAINTIFF IN error,
v.
THE KEYSTONE CONSOLIDATED MINING Company.
} No. 637.

BRIEF ON BEHALF OF THE UNITED STATES.

The facts upon which the questions in the present case arise are fully stated in the findings of the court below. (C. See Record, fol. 60.)

They may be briefly summarized as follows:

The plaintiff in error claims under a grant from the State of California. The defendant has a patent from the United States.

The sixth section of the act of March 3, 1853, is as follows:

"That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting also the lands

claimed under any foreign grant or title, and the mineral lands, shall be subject to the pre-emption laws of fourth September, eighteen hundred and forty-one," &c.

The lands in question are mineral lands and a part of the thirty-sixth section. Upon this land, as early as 1851, there had been locations of mining claims, and the original locators and their grantees have held undisturbed possession thereof from the date of such location until the present time, and the possessory title to each of said claims acquired by said locations, respectively, and by such possession and the working of said mines, was vested in the defendant or its grantors at the time of its application for patents to said mines being filed (which patents have since been issued), unless it shall be held that the State of California acquired title to said section 36 by grant from the United States. No survey of the lands in question, so as to indicate the sections, was made until March 10, 1870.

The United States is only interested in the question between these parties in order that the Department of the Interior may ascertain the limits of the grant to the State of California and the proper construction of the law, questions arising out of this matter being under daily consideration in that department.

This brief follows (with the addition of cases since decided) substantially the current decision of the Secretary of the Interior of June 18, 1872, printed herewith.

The first question presented is as to the time when the title vests in the State to sections 16 and 36 under the said act.

We contend that the grant, though in words *in presenti*, took effect to vest title for specific tracts only upon survey. The seventh section excepted from the grant

land upon which settlement had been made prior to survey, and this although the settlement was made for purposes other than pre-emption appropriation. That section is in part as follows:

"*And be it further enacted*, That where any settlement, by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth or thirty-sixth sections before the same shall be surveyed, or where such sections may be reserved for public uses, or taken by private claims, other lands shall be selected by the proper authorities of the State in lieu thereof."

A dwelling-house may be erected by a person, or he may cultivate a portion of a tract of land without acquiring a pre-emption claim. Both the erection of a house and cultivation are requisite to pre-emption. The adoption of this alternative expression negatives the idea that a pre-emption settlement alone was intended. If thus limited, none of the settlements or improvements made by miners who located in villages would be protected. It is hardly reasonable to suppose that it was the intent to grant to the State the valuable improvements of miners, and in some instances even to include whole villages in the vicinity of the mine. This is strengthened by the last clause of the eighth section which provides, in regard to towns: "Such towns as are located on or near mineral lands, the inhabitants of which shall have the right of occupation and cultivation only until such time as Congress shall dispose of the same."

This section was evidently intended to protect all settlements made upon the public lands, before survey, from the grant to the State; and this whether it was the settlement of a pre-emptor or that of any person pursuing any lawful calling. It was known that the

settlements in California made when this act was passed were comparatively few, except for the purpose of mining; and in the disposition of the public lands it was intended to protect all the various elements which could properly claim recognition by reason of actual settlement for lawful purposes.

These suggestions are made upon the assumption that it is competent for the State to take mineral lands where there has been no settlement. We shall, however, hereafter contend that no title to mineral lands passed by the grant of the sections in question. The restraining clause of the provisions in the seventh section is to be held as operating upon the grant made by the sixth section. The reason in favor of this proposition is in harmony with the views of this court stated in Heydenfeldt *v.* Daney Gold and Silver Mining Company (3 Otto, 634).

Sherman *v.* Buick (93 S. C., 209), Water and Mining Company *v.* Bugbey (96 S. C., 165), were cases of preemptors, and it did not become necessary to consider whether the effect of the seventh section of the act in question did not extend to other settlers. In Beecher *v.* Wetherby (95 S. C., 517), while it is held that whether the compact with the State constituted only a pledge in futuro, or operated to transfer to her the sections as soon as they could be identified by the public surveys of the lands embraced within them not set apart from the public domain, and could not subsequently be diverted from the appropriation to the State, the court were dealing with the compact or grant, the question in its character having no such restraining clause as is found in this.

The further inquiry is whether the grant includes mineral lands when such mineral lands are found to be in sections 16 and 36. The eighth section provides that

inhabitants of towns located in or near mineral lands shall have the right of occupation or cultivation only until such time as Congress shall dispose of the same. Upon this point we refer to the decision of the Secretary printed herewith.

CHAS. DEVENS,
Attorney-General.

APPENDIX.

DEPARTMENT OF THE INTERIOR,
Washington, April 28, 1873.

SIR: I have examined the case of the Keystone Consolidated Mining Company, Original Amador Mining Company, Bunker Hill Quartz Mining Company, Eureka Quartz Mining Company, and town site of Amador City *v.* The State of California, on appeal to the department from the decision of the Commissioner of the General Land Office of June 18, 1872.

The land in question is the east half of section 36, township 7 north, range 10 east, Mount Diablo meridian, in the State of California. The State claims the entire tract under the act of Congress of March 3, 1853 (10 Stat., 244, sec. 6), as school land. The mining companies claim a portion of it under the act of July 26, 1866 (14 Stat., 251), and Amador City claims a part of it under the act of March 2, 1867 (14 Stat., 541). The land is mineral land, and said mining companies located their mines for most of the territory now claimed by them in 1851, and for the remainder in 1856, 1863, and 1864. They have continuously worked these mines from time of location to the present, and have expended on the same a large sum, exceeding $1,000,000, and have realized from them a still larger sum. They have complied with all the provisions of the act of July 26, 1866, and have made their respective applications in due time.

Amador City was located on the half section in controversy, in the immediate vicinity of said mines, in 1851, and then had a population of about seventy-five persons. It contained about three hundred inhabitants at the date of the act of March 3, 1853, and now contains about five hundred. It has about one hundred dwelling-houses, two stores, two saloons, one hotel, one post-office, one express office, one telegraph office, one church, and one school-house. It has filed an abandonment of all claim to any portion of the legal subdivisions upon which it is situated, so far as the same conflicts with the claim of either of the mining companies.

The survey of the township lines of said township 7 was completed August 27, 1869. The section lines were run March 10, 1870. The plat was approved September 30, 1870, and filed in the local office October 7, 1870. The State of California, on the fourth of November, 1870, sold to Henry Casey the east half of said section 36 for the sum of $400, and the claim to the same is now prosecuted by him or those who claim under him.

Upon these facts, it is conceded by all parties to this contest, that each of the said mining companies is entitled to a patent for the lands claimed by it, unless the title for said half section is now vested in the State of California or its grantee. It is also conceded that the claim of Amador City is good and valid, unless in conflict with the title of the State or its grantee.

The local officers rejected the title of the State, and their decision was affirmed by the Commissioner.

The claimant under the State has appealed, and the whole case is now before this department on its merits. It involves a construction of the act of March 3, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes."

In attempting to ascertain the true meaning of this act, I shall assume, as hornbook law, that in every valid grant there must be a grantor capable of making the grant, a grantee capable of taking it, and a thing granted capable of identification with reasonable certainty; that

all grants made by the General Government to individuals, corporations, or States are to be construed strictly against the grantee, and that nothing passes by implication; that the intent of the law-makers is to govern, and that such intent is to be gathered from the entire act.

In the further examination of this case, I propose to consider the following inquiries:

First. When does title vest in the State to sections 16 and 36 under said act?

Second. Does the seventh section except from the grant land upon which settlement has been made prior to survey for other purposes than pre-emption appropriation?

Third. Does the grant include mineral lands in sections 16 and 36?

First. When does title vest in the State to sections 16 and 36, under said act? Section 6 of the act reads as follows: "That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections 16 and 36, which shall be, and hereby are, granted to the State for the purposes of public schools in each township, and with the exception of land appropriated under the authority of this act or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the pre-emption laws of fourth September, eighteen hundred and forty-one," etc.

It is claimed by appellant that this section contains a grant *in presenti* to the State, taking effect from the date of the act, upon all tracts afterward located by government survey on sections 16 and 36 in each township, and that complete title was vested in the State to the same on the 3d of March, 1853, and that Congress thereafter had no power to provide a way for a different disposition of any such lands. On the other hand it is claimed, on behalf of the mining and town-site companies, that the grant, though in words *de presenti*, was in fact a grant in the nature of a float, taking effect to vest title upon no specific tracts until survey, and that, until such survey,

Congress had power to make other and different disposition of the land.

The power of Congress to change, modify, alter, or repeal the grant in question at any time prior to the date when title vests in the State, will not, I think, be questioned, and it is equally clear that after title has once vested, Congress has no further power to alter, modify, or change the grant. It is evident, therefore, that, with reference to this branch of the case, it is only necessary to inquire whether title to sections 16 and 36 vested in the State prior to the act of July 26, 1866. If it did, then Congress had no power to dispose of the land in the manner pointed out in that act; if it did not, then the title of the mineral claimants is good and patents must issue to them for the tracts claimed.

In my opinion, the sixth section of the act of 1853 should be construed as a grant to the State *in presenti*, in the nature of a float, taking effect upon specific tracts when the same are surveyed by the United States, and not before. The grant is, in words, *de presenti*, but until survey there are no tracts or parcels of land in existence answering to the calls of the grant. A beneficial interest under it can only ensue to the State when the United States, in extending the lines of the public surveys, sets apart certain tracts and designates them as sections 16 and 36. It will not be denied that Congress had the legal power, no matter what may be said of the political obligation of the government, to provide that this land should never be surveyed, or that in surveying it a different method should be adopted than that now in use, and no such tracts as sections 16 and 36 be set apart. Would not the passage of such an act have operated to entirely defeat the grant to the State? The grant calls for certain tracts by recognized technical designations. No such tracts could be found, and the State would be without remedy to compel the government to create them. A like effect would be produced by a refusal of the executive officers of the government to extend the surveys. The State would be indefinitely without beneficial interest in the grant. Of course the

happening of the contingency I have mentioned could hardly for a moment be apprehended, for the United States is, in good faith to the State, and in the performance of its political obligations, bound, within reasonable time in the extension of the public surveys, to set apart the tracts granted; but I refer to it to show the nature of grant in the State and its liability to defeat before survey.

I think the grant is in nature the same as that usually made by Congress to railroad companies to aid in the construction of their roads. These grants are generally for a certain number of sections, designated by odd numbers on each side of the road, with a provision for indemnity selection, in case any of such sections shall have been sold or otherwise disposed of prior to the definite location of the line. The highest judicial authority (Railroad *v.* Smith, 9 Wallace, 99; Railroad *v.* Fremont Co., 9 Wallace, 90) has repeatedly held that these grants did not vest any right in the companies to specific sections until the line of the road was definitely fixed on the face of the earth. The grant to California by the act of 1853 is similar. It is for certain sections designated by numbers, the precise location of which cannot be definitely ascertained until survey. The grant in both becomes certain upon the happening of a contingency; in the former by definite location, in the latter by survey. In the railroad cases, the Supreme Court holds that title to specific tracts vests only on the happening of this contingency that makes the grant certain as to location. Why should not the same rule be applied to the grant to the State, and the title held to be vested upon the happening of the contingency that makes that grant certain as to location?

In the case of Gaines *et. al. v.* Nicholson (9 How., 365), passing upon the right of the State of Mississippi to school sections under an act (2 Stat., 229) reserving section sixteen in each township for the support of schools, and two subsequent acts providing for indemnity to the State for loss of same by reason of interference with foreign grants and for leasing such lands for

the support of schools, the Supreme Court said: "The State of Mississippi acquired a right to every sixteenth section by virtue of these acts on the extinguishment of the Indian right of occupancy, the title to which in respect to the particular sections became vested, if vested at all, as soon as the surveys were made and the sections designated."

The case of Cooper *v.* Roberts (18 How., 173), although cited and relied upon by counsel for the State, seems not to sustain their position, but rather follows and affirms the principles enunciated in Gaines *v.* Nicholson.

The United States, in her compact with the Territory of Michigan, on her admission to the Union as a State, ratified July 22, 1836, appropriated to the State section 16 in each township for the benefit of schools. The land in controversy was surveyed in the summer of 1847, and designated as section 16. The right of the State to the same was contested by certain mining claimants asserting rights under a purchase from the government of lead mines, under the act of March 1, 1847, to whom a patent had issued, reserving the right of the State. The court first examined the history of the usual grants to the States, upon their admission to the Union, for the benefit of schools, showing that these gifts were the result of a cherished policy on the part of the government for the encouragement of popular education, and declaring that the compact with the States did not except mineral lands from the operation of the grant. The court then said: "We agree that, until the survey of the township and the designation of the specific sections, the right of the State rests in compact, binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach, and, if there is no legal impediment, the title of the State becomes a legal title." The court then passed to the consideration of the question whether any such "legal impediment" was

created by the act of 1847, and decided that there was not, for the reason that said act expressly excepted section 16 from its operation. The court then further inquired whether the execution of a lease to the mineral claimants by the Secretary of War, with the right of renewal upon the lessee's compliance with certain conditions, upon which lease the claimants, having continued in possession and complied with conditions, were allowed to make entry under the act of 1847, was a legal impediment preventing the title from vesting in the State, and held that it was not such an impediment, for the reason that the claim of the company was not perfect under the lease, the act of 1847, and the act of September, 1850 (9 Stat., 472). The court said: "Hence had there been a legal impediment to the execution of the compact with Michigan, enacted either by the second section of the act of 1847, which separated, for some purposes, the mineral from the public lands, or by the privileges granted to the lessees or their assigns, in the third section of that act, it was removed by the repealing clause of the act of 1850, and the non-compliance with the conditions on which the privileges depended."

It is thus seen that even in the case of a compact between the United States and the State of Michigan, duly ratified by the State (a much stronger case than that of the simple grant, by an ordinary act, to the State of California), the Supreme Court recognized the power of Congress, by subsequent legislation, to interpose a legal impediment to the title to school sections vesting in the State upon survey. There was no intimation that this power of Congress was doubted by the court. It was plainly recognized in every inquiry, and the title of the State was affirmed on the sole ground that no such impediment existed.

In the case of Kissell *v.* Saint Louis public schools (18 How., 19), in discussing the right of the school commissioners of Saint Louis to certain out-lots, town lots, etc., reserved for the use of schools by the act of June 13, 1812 (2 Stat., 148), and the confirmatory act of January 27, 1831 (4 Stat., 435), which said lots were to be

surveyed under the provisions of the first mentioned act, the court said: "Our opinion is that the school lands were in the condition of Spanish claims after confirmation by the United States, without having established and constructed boundaries made by public authority, and which claims depended for their specific identity on surveys to be executed by the government. The case of West *v.* Cochran (17 How., 413), lays down the dividing line between the executive and judicial powers in such cases, to wit: that until a designation, accompanied by a survey or description, was made by the surveyor-general, the title attached to no land, nor had a court of justice jurisdiction to ascertain its boundaries."

In the case of Van Valkenberg *v.* McCloud (21 Cal. S. R., 330), the supreme court, of California, in construing the five hundred thousand acre grant to the State, under the act of Congress of September 4, 1841 (5 Stat. 453), held that selections could be made thereunder prior to the survey of the land, subject to subsequent change to conform to the government lines, but this decision was overruled in the subsequent cases of Terry *v.* Megerle (24 Cal., 624), Grayson *v.* Knight (27 Cal., 507), and Middleton *v.* Lowe (30 Cal., 596). In the latter case, referring to the decision of Grayson *v.* Knight, the question being one relating to the right of the State to sections 16 and 36, under the act of 1853, the court said: "The reasons operating to prevent the State or her vendee from acquiring a title by the aid of selection made, as in that case, before the Congressional survey, are equally cogent to show that title to any particular parcel of the lands granted for the purposes of public schools, does not vest in the State until such survey has been made. * * * It thus appears that the grant to the State has not attached to the land in controversy (section 36), both because of the exception to the act of Congress in favor of private grants, and because the lands have not been surveyed by the United States."

The cause of Higgins *v.* Houghton, relied upon by counsel to sustain the claim of the State, seems rather, upon a careful examination, to sustain an opposite view of the

law from that contended for. The case involved a question as to the right of the State under the act of 1853 to sections 16 and 36, and the court said: "We consider that in the grant to California of March 3, 1853, the power of locating the quantity granted, 1,280 acres, in effect in two parcels in every township, was reserved by the government, and as fast as townships thereafter were surveyed and sectionized, that the State became the owner of the sixteenth and thirty-sixth sections absolutely, not only as to quantity, but as to position also. Township No. 13 was surveyed and properly subdivided subsequent to the grant and prior to May 20,1861; and since the date of that occurrence, the State, by the effect of the grant, and by the law of the event, has been and is now the absolute and several owner of the sixteenth and thirty-sixth sections of that township as against the government. If there is any legislation by Congress prior to the grant which would interfere with the conclusion, as the objection in effect supposes, it has not been brought to our notice, and if there has been any legislation since the grant that conflicts with the conclusion, it must be null and void, unless, indeed, it has been acceded to by the grantees." The court here distinctly holds that, when township No. 13 was surveyed and properly subdivided, the State, by the effect of the grant and the law of the event, acquired an absolute and several ownership to the sixteenth and thirty-sixth sections. This is what I hold to be the true interpretation of the act, and I have no doubt that, after such survey, the title of the State in agricultural lands was vested and beyond the reach of Congress. I do not understand the reference by the court to possible legislation of Congress to mean anything more than that any subsequent legislation attempting to interfere with this vested right would be null and void.

I find strong support for the view I have expressed in other portions of the act of March 3, 1853, and in contemporaneous legislation. The seventh section provided that where the sixteenth and thirty-sixth sections should be reserved for public uses before the same should be

surveyed, other land should be selected by the proper authorities of the State in lieu thereof. At the passage of the act no reservations of lands for public uses in California, or comparatively none, had been made. The public lands were unsurveyed, and reservations would be needed for light-houses, forts, arsenals, fortifications, and Indian reservations. There were then over 60,000 Indians in the State, and provision would necessarily be required for them. In fact, Congress did provide for five Indian reservations in California, of 25,000 acres each, on the very day this act was passed (10 Stats., 238). Is it for a moment to be supposed that Congress would, by the sixth section, give to the State an absolute vested right in all lands that should fall upon sections 16 and 36, and in the very next section provide that it should have no right whatever in any of said sections which might thereafter be reserved, before survey, for public uses, but should be compelled to take other lands in lieu thereof? I cannot believe that it so intended.

In opposition to the reasons and authorities above set forth, counsel for the State have cited several cases, which they claim sustain a different construction of the act, and which I will now consider. The first of these is Rutherford *v.* Greene (2 Wheat., 196). In 1782, the State of North Carolina passed an act, by which the State reserved a tract of land for the relief of officers and soldiers in the continental line, and appointed a board of commissioners to set off the lands allotted to each. The tenth section provided "that 25,000 acres of land shall be allotted for, and given to, Major-General Nathaniel Greene." The commissioners allotted 25,000 acres to General Greene, and caused the tract to be surveyed, which was done on the eleventh of March, 1783. It was claimed that the words "shall be allotted" did not import a grant, and that the legislature, after the allotment and survey, had made a different disposition of the land in controversy; but the court held that the title of Greene was valid. Chief Justice Marshall, in delivering the opinion of the court, said: "As the act was to be performed in future, the words

directing it are necessarily in future tense. 'Twenty-five thousand acres of land shall be allotted for and given to Major-General Nathaniel Greene.' Given when? The answer is unavoidable. When they shall be allotted. Given how? Not by any future act, for it is not the practice of legislation to enact that a law shall be passed by some future legislature, but given by force of this act." "Nothing can be more apparent than the intention of the legislature to order these commissioners to make the allotment, and to give the land when allotted, to General Greene." * * * "The general gift of 25,000 acres lying in the territory reserved for the officers and soldiers of the line of North Carolina, had now become a particular gift of the 25,000 acres contained in the survey." * * * "It is clearly and unanimously the opinion of this court, that the act of 1782 vested a title in General Greene to 25,000 acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey, made in pursuance of that act and returned in March, 1783, gave precision to that title and attached it to the land surveyed. That his rights are not impaired by the act of 1783 and the entry of appellant, all of which are subsequent to his survey."

It would be difficult for the learned counsel to find a case more in conflict with the doctrine which it is cited to support.

In Lessieur *v.* Price (12 How., 59), the Supreme Court construed the act of Congress of March 6, 1820 (5 Stats., 545), which enacted "that four entire sections of land be, and the same are hereby granted to the said State (Missouri) for the purpose of fixing the seat of government thereon; which said sections shall, under the direction of the legislature of said State, be located as near as may be in one body, at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States."

Four sections were selected which were claimed under a New Madrid location, and it became material for the court to fix the time at which title vested in the State

to the lands selected. The court said: "The land was granted by the act of 1820; it was a present grant, wanting identity to make it perfect; and the legislature was vested with full power to select and locate the land; and we need only here say, what was substantially said by this court in Rutherford *v.* Greene's Heirs (2 Wheat., 196), that the act of 1820 vested a title in the State of Missouri of four sections; and that the selections made by the State legislature, pursuant to the act of Congress, and the notice given of such location to the surveyor-general, and the register of the local district where the land lay, gave precision to the title and attached to it the land selected." And again: "The next inquiry is as to the date when the land selected attached to the grant. June 28, 1821, the governor of Missouri notified the surveyor-general of the fact that the land had been located by the commissioners, and awaited the action of the legislature, and on the 31st day of December, 1821, the land was accepted by the legislature. The same act provides for laying off a town and the establishment of the seat of government thereon. And as the commissioners had power to locate, and did so, subject only to legislative sanction of their report, and that report was sanc.ioned, our opinion is that the acts were concurrent, and that the title refers to the first act, and therefore that the State took title from the 28th of June, 1821, when the surveyor-general was notified that the location had been made."

Thus it appears that although the court held that the grant was a present one, it also held that title to the particular sections did not vest on the 6th of March, 1820, the date of the act, but did vest on the 28th of June, 1821, the date when the surveyor-general was notified of the selection.

By parity of reason, it should be held in the case now under consideration that although the grant to the State by the act of 1853 was a present grant, yet it did not vest title to sections 16 and 36 until a survey had been made which "gave precision to the title, and attached to it the land surveyed."

In How *v.* The State of Missouri (18 Howard, 126), the court held that the grant to the State of section 16 in contest, by act of March 6, 1820 (2 Stats., 547), adopted by ordinance declaring the assent of the State thereto, July 19, 1820, was not affected by the subsequent confirmation by Congress of a Spanish claim theretofore rejected by the board. It appears, however, that the particular section in contest in that case was surveyed prior to the passage of the act confirming the Spanish claim, and that three of the justices dissented from the opinion of the court, if intended to go further than to hold that although the tenth section of the act of March 3, 1811, prevented title from vesting in the State until final decision by Congress on the claim of Vallé (Spanish claimant), yet the act of May 24, 1828, confirming lands to Vallé, operated as such final decision, and excepted from confirmation so much land as was included in section 16 then surveyed.

In the case of Veeder *v.* Guffey (3 Wis., 520), it was held that the act of Congress approved August 8, 1846, took effect upon the admission of the Territory of Wisconsin to the Union as a State; that it vested in the State the title, potentially, to a quantity of land equal to three sections in width on each side of the Fox River, and determined the location of the lands to be the alternate sections on each side of the river, requiring only the ministerial acts of survey, selection, and approval to render the specific parcels which would fall to the State or the United States definite and fixed, and that, by the grant, the State, upon admission to the Union, became seized of one-half of the lands on each side of the Fox River; and, the mode of partition being established by the grant, it was competent for the State to provide modes and terms of sale. It will be noticed that in the act of 1846 are descriptive words very dissimilar from those used in the act of 1853, being as follows: "A quantity of land equal to one-half of three sections in width on each side of said Fox River"; and also that by the second section of the act it is distinctly provided "that, as soon as the Territory of Wisconsin

shall be admitted as a State into the Union, all the lands granted by this act shall be and become the propperty of the State." This express provision of the second section, and the peculiar character of the descriptive words, seemed to have governed the court in its decision as to the time when the title vested in the State.

Secretary Stuart, September 10, 1851 (1 Lester, 495), in passing upon the grant to Michigan of school sections, already referred to, in citing the case of Cooper *v.* Roberts (18 How., 173), said: "I regard it as an absolute grant of every sixteenth section which had not on the twenty-third June, 1836, been sold or otherwise disposed of, whether then designated by survey or not." This decision was followed by Acting Secretary Otto, July 10, 1867, in a case involving the construction of the act of 1853, under which the State of California claims. In this case the acting Secretary said: "The sixth section of the act entitled 'An act to provide for the survey of the public lands in California,' etc., approved March 3, 1853, granted to the State of California, of the public lands, whether surveyed or unsurveyed, sections 16 and 36, for the purposes of public schools in each township."

From this quotation it would appear that the acting Secretary construed the sixth section as though it read "with the exception of sections 16 and 36, which, whether surveyed or unsurveyed, shall be, and hereby are, granted to the State for the purposes of public schools," etc. I think it should be construed as though it read as follows:

"*And be it further enacted*, That all the public lands in the State of California, whether surveyed or unsurveyed, shall be subject to the pre-emption laws of fourth of September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, except as herein otherwise provided, and with the exception of sections sixteen and thirty-six, which shall be, and hereby are, granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act or

reserved by competent authority, and excepting also the lands claimed under any foreign grant or title, and the mineral lands."

I have been shown a newspaper report of a late decision of the supreme court of California, in the case of Sherman *v.* Buick, in which that court held that the act of March 3, 1853, vested an absolute title in the State to sections 16 and 36 from the date of the passage of the act, and that Congress thereafter had no power to dispose of said sections before survey. The opinion of the court is very brief. It cites and relies upon the former rulings of the court in the cases therein mentioned, which cases, as I understand them, do not go to the full extent claimed for them.

This decision is not satisfactory to my mind, and I apprehend is not entirely satisfactory to the learned court which pronounced it, as I am informed that a rehearing has already been allowed.

I am satisfied, upon full consideration of all the cases cited, and the exhaustive arguments of the able counsel representing all parties in interest, that the weight of authority is clearly in favor of the construction I have given above.

Second. Does the seventh section except from the grant land upon which settlement had been made prior to survey for other purposes than pre-emption appropriation?

The seventh section of the act of 1853 is in part as follows:

"*And be it further enacted*, That when any settlement by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections before the same shall be surveyed, or when such sections may be reserved for public use or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof."

It is claimed on behalf of the mineral claimants that this section excepts from the operation of the grant all lands in sections 16 and 36 upon which a settlement of

any kind had been made, prior to survey, by the erection of a building or buildings, or the cultivation of any portion of the land, whether such settlement was made with a view to pre-emption, or for entry as town sites, or otherwise. On the part of the State it is claimed that the exception includes only settlements made with a view to pre-emption, and that none other would protect sections 16 and 36 from the grant.

The language of the seventh section is not so clear as to be entirely free from doubt, but a careful examination of the terms used, and a consideration of the various objects evidently intended to be accomplished by Congress in its passage, will show, I think, that the exception includes more than simply settlements with a view to pre-emption.

I call attention to the language used: "That where any settlement, by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections," etc. A person may erect a dwelling-house on, or he may cultivate a portion of a tract of land without acquiring a pre-emption claim. Both the erection of a house and cultivation are requisite on the part of a pre-emption.

If Congress had intended to limit the settlement of what is technically known as a pre-emption settlement, I think it would have used more apt words to express such intent. It would have said "that where any pre-emption settlement shall be made," etc. It has done no such thing; but, on the contrary, has adopted such a mode of expression as, to my mind, negatives the idea that a pre emption settlement alone was intended.

To limit the exception to settlements made by pre-emption claimants, would be to protect comparatively few of the actual settlers in any of the mining districts, and to award to the State many very valuable and lasting improvements made under authority and sanction of law and the usages of the country. It is a notorious fact that few, if any, settlements in the early days of California were made in any portion of the State for the purposes of agriculture. Emigration was drawn to

the State, and settlements made almost entirely with a view to developing and working the newly-discovered mines. The miners located in villages and small settlements, cultivating the land only so far as was necessary in following their occupation of mining. Under the construction of the act contended for by the State, none of the settlements or improvements so made were protected from the grant, except, perhaps, town sites upon purely agricultural lands. Is it reasonable to suppose that Congress intended to protect isolated pre-emption claimants, and at the same time to grant to the State the valuable improvements of miners, and in some instances include whole villages in the vicinity of the mines? The eighth section of the act expressly provided that the public lands (not mineral) occupied as towns or villages should not be subdivided or subject to sale or appropriation by settlement under the provisions of the act, but should be subject to the town-site act of May 23, 1844, except town sites on or near mineral lands, the inhabitants of which should have the right of occupancy or cultivation only until such time as Congress should dispose of the same. I do not suppose it will be doubted that this section excepted from the grant of the State any such town sites found by survey upon agricultural land in sections 16 and 36; but if the construction of sections six and seven, contended by the State, be allowed, it is clear that a town located on or near mineral lands would pass to the State under the grant. Can it be for a moment supposed that Congress intended to hold out inducements to miners to settle on or near mineral lands in towns and villages, and by the very same act give their improvements away to the State, while protecting some, and these the solitary agricultural settlers?

One of the great objects of the act seems to be in providing for the disposition of the public lands, according to the various elements claiming recognition, and to protect each interest created from encroachment by the others. The seventh section was intended to protect all settlements made upon the public land before survey

from the grant to the State, which, from its peculiar nature as to final position, threatened every settler whose claim or improvements were not bounded by subdivisional lines of public surveys. This intention of Congress would be defeated by the construction contended for by the State.

I am of opinion, therefore, that the seventh section of the act excepts from the grant to the State lands upon sections 16 and 36, upon which any settlement, by the erection of a building or buildings, or the cultivation of any portion of the land, has been made prior to survey.

Third. Does the grant include mineral lands in sections 16 and 36?

In my opinion, Congress, by the act of 1853, did not intend to grant, and did not grant, to the State any mineral lands that, by survey, are shown to be in sections 16 and 36. The act was passed soon after the discovery of the great mineral wealth of California had been made. The attention of the country and of Congress was called to the question of the disposition of such lands. No plan had been adopted. Congress for the first time undertook to legislate in regard to the public lands in that State.

A careful examination of the act will show that Congress did not intend to dispose of any of its mineral lands, but contemplated a future disposition of them. The eighth section provides that the inhabitants of towns located on or near mineral lands, shall have the right of occupation and cultivation "only until such time as Congress shall dispose of the same." It evidently did not then suppose that it was disposing of a considerable portion of them. The act, in a great many of its provisions, very carefully reserves the mineral lands from its operation. Thus, in the sixth section, it is provided that the mineral lands shall be excepted from the lands subject to the pre-emption laws; in the seventh section it is provided that no person shall obtain the benefits of this act "by a settlement or location on mineral lands," and in the eighth section it is provided that the inhabitants of towns located on or near mineral

lands, shall have the right of occupation and cultivation, only until such time as Congress shall dispose of the same. And, in the twelfth section, it is provided that the State shall have the right to select two townships, or seventy-two sections, for the use of a seminary of learning: "*Provided, however*, That no mineral lands shall be subject to such selection"; and in the thirteenth section the State is given the right to select ten sections for the purpose of erecting the public buildings of the State: "*Provided, nowever*, That none of said selections shall be made of mineral lands." Why all this care and painstaking to exclude mineral lands from these minor provisions, if it were intended to give the State mineral lands in the major provision relating to the sixteenth and thirty-sixth sections? I think Congress intended to reserve all the mineral lands from the operation of the act, and that there might be no doubt about this reservation as to the sixteenth and thirty-sixth sections, it expressly provided in the third section "that none other than township lines shall be surveyed when the lands are mineral." As I have before attempted to show. the grant could not take effect until survey, and this third section, which must be construed as a part of the act, and in connection with all its other provisions, expressly prohibits the only survey that could possibly locate these sections. It therefore, in connection with the other express reservations, satifies my mind that Congress did not intend to make a grant of mineral lands to the State, and that those members of Congress who undertook to speak for the committees having the matter in charge, were correct when they stated in debate that no mineral lands were granted by the act. (See Cong. Globe, vol. 25, pp. 1036–1038.)

I regard the act of July 26, 1866, as providing an exclusive method for appropriating the mineral lands of the United States. It was the first act passed by Congress, and perhaps the first ever passed by any government which undertook to dispose of its mineral lands. It provided in its first section "That the mineral lands of the public domain" (which is equivalent to saying all

the mineral lands of the public domain), "both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

It required every person claiming any mine to occupy and improve the same, and expend thereon in labor or improvements not less than $1,000, and to do and perform certain other things. It limited the location of any individual to two hundred feet along the vein, with an additional two hundred feet for discovery, and any association not more than three thousand feet, and required payment at the rate of $5 per acre. It provided that, when the mineral lands should be surveyed, the Secretary of the Interior might designate and set apart such portions of the same as were clearly agricultural, and that the same should be subject to pre-emption and sale as other public lands. In short, it adopted a system for the disposition of the mineral lands, and such a system as would give every citizen an equal opportunity to engage in the business of developing them. It was evidently intended to be the only method by which mineral lands could be appropriated. It made no exceptions in favor of school or other grants.

If the State should obtain two sections in every mineral township, it might establish a mineral system for itself, and one in conflict with that of the General Government. In my opinion Congress never intended to make such a state of things possible.

No surveys of mineral lands were authorized or made until the passage of the act of July 9, 1870 (16 Stat., 217, sec. 16), and long after the passage of the act of 1866.

I am constrained to hold that no mineral lands were granted by the act of 1853. If I am in error, the State can lose nothing, for she has an easy method of present-

ing the question for decision of the Supreme Court, where it will doubtless finally go. If, however, my decision should be in favor of the State, and it should be erroneous, there would be very many cases in which I am unadvised of any way by which the error could be corrected.

I affirm your decision and herewith return the papers transmitted, with your letter of the twenty-first of October last.

Very respectfully,

C. DELANO, *Secretary.*

Hon. W. DRUMMOND,
Com'r General Land Office.

No. 637——3

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JAMES H. McKENNEY, Clerk

DECISIONS

OF

THE COMMISSIONER

OF THE

GENERAL LAND OFFICE,

AND THE

SECRETARY OF THE INTERIOR,

IN THE MATTER OF THE

KEYSTONE CONSOLIDATED MINING COMPANY, ORIGINAL AMADOR MINING COMPANY, BUNKER HILL QUARTZ MINING COMPANY, EUREKA QUARTZ MINING COMPANY, AND TOWN SITE OF AMADOR CITY

VS.

THE STATE OF CALIFORNIA,

INVOLVING

THE RIGHT OF THE STATE OF CALIFORNIA TO SCHOOL SECTIONS WHICH ARE MINERAL IN CHARACTER.

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DECISION OF THE COMMISSIONER OF THE GENERAL LAND-OFFICE.

DEPARTMENT OF THE INTERIOR, GENERAL LAND-OFFICE,
Washington, June 18th, 1872.

Register and Receiver, Sacramento, California—GENTLEMEN: The papers, testimony, arguments and your joint opinion in the matter of a controversy between certain mining claimants, the town of Amador and Henry Casey (grantee of State of California), affecting the right to the east half of section 36, in township 7 north, range 10 east, Mount Diablo base and meridian, have been examined.

The question involved is mainly one of law, viz: as to the right of the State of California, under the grant of March 3d, 1853, to lands found upon survey to be numerically designated under our public land system as Sections 16 and 36, where such lands were, at the date of such survey and designation, in the *bona fide* possession of parties properly qualified, who claim the right of having the mining and town site laws of the United States executed in their favor.

It has never been clear to this office that the grant by the act of March 3d 1853, of Sections 16 and 36 to the State of California, for school purposes, vested any right in said State to mines, or that the decision of the Supreme Court (case of Cooper *vs.* Roberts) affirming the right of the State of Michigan to certain copper-bearing lands in school section 16, in that State, was applicable to California, for the reasons:

First. That the said act of March 3d, 1853, "to provide for the survey of the public lands in California, the granting of pre-emption rights therein and for other purposes," is simply a law in the ordinary meaning of the term, and as such repealable at the will of the law-making power, whereas the act approved June 23d, 1836, entitled an act supplementary to an act entitled an act to establish the northern boundary line of the State of Ohio, and to provide for the admission of the State of Michigan into the Union on certain conditions, belongs to that class of laws which are legislative compacts, and which, in that case, became obligatory and binding upon the parties to it, viz: the United States and the State of Michigan, on the 25th of July, 1836, that being the day upon which the State of Michigan passed the act of acceptance. And

thority of said statute of July 26th, 1866, and that they or their grantees, upon compliance with the mining laws of Congress, will be entitled to patents for their respective claims, the same as if they were upon unsurveyed lands or within sections other than sixteen and thirty-six. With regard to the town of Amador, it appears from the record that it was settled previous to the year 1853; that on the 28th of November, 1870, J. Foot Turner, County Judge, filed in your office declaratory statement No. 2,171 in trust for the inhabitants of said town, claiming the right to enter the northeast quarter, east half of northwest quarter, northwest quarter of southeast quarter and northeast quarter of southwest quarter of said section 36, in virtue of the town site law of March 2d, 1867; that he subsequently filed abandonments of said town site claim so far as it affected the north half of northeast quarter of said section, and the veins, lodes or ledges and surface ground claimed by the several mining companies in the east quarter of said section.

The town site law of March 2d, 1867, expressly provides that no title shall be acquired under its provisions to any mine of gold, silver, cinnabar or copper, and the act amendatory thereof, approved June 8th, 1868, provides that no title under said act of 2d March, 1867, shall be acquired to any valid mining claim or possession held under existing laws of Congress.

Several mining claims are shown to exist within the limits of the land claimed for said town site; therefore this office will not finally pass upon said town site application until all mining claims within its limits shall have been adjusted according to law; it being decided that after all the mining claims therein shall have been segregated and finally adjusted, the remainder of the land included by said town site application may be entered in the usual manner for the inhabitants of the town as provided by law.

As a portion of the said town of Amador appears to lie upon some of these quartz claims, it will be necessary, in issuing the patents for the mines, to insert a special clause excepting and excluding from such conveyance any and all town property or municipal rights upon the surface ground so patented, such as houses, buildings, structures, lots, blocks, streets, alleys, or other improvements not belonging to the grantee named in the patent, and all rights necessary or proper to the occupation, possession or enjoyment of the same.

You will notify all parties in interest hereof, allowing sixty days from notice in which an appeal may be taken to the Hon. Secretary of the Interior, should the same be desired.

Please acknowledge the receipt hereof as "N," and report your action in the premises.

Very respectfully, your obedient servant,

WILLIS DRUMMOND, Commissioner.

DECISION OF THE SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR,
Washington, April 28, 1873.

SIR: I have examined the case of the Keystone Consolidated Mining Company, Original Amador Mining Company, Bunker Hill Quartz Mining Company, Eureka Quartz Mining Company, and town site of Amador City *vs.* The State of California, on appeal to the Department from the decision of the Commissioner of the General Land Office of June 18, 1872.

The land in question is the east half of section 36, township 7 north, range 10 east, Mount Diablo meridian, in the State of California. The State claims the entire tract under the act of Congress of March 3, 1853, (10 Stat., 244, sec. 6,) as school land. The mining companies claim a portion of it under the act of July 26, 1866, (14 Stat., 251,) and Amador City claims a part of it under the act of March 2, 1867, (14 Stat., 541.) The land is mineral land, and said mining companies located their mines for most of the territory now claimed by them in 1851, and for the remainder in 1856, 1863, and 1864. They have continuously worked these mines from time of location to the present, and have expended on the same a large sum, exceeding $1,000,000, and have realized from them a still larger sum. They have complied with all the provisions of the act of July 26, 1866, and have made their respective applications in due time.

Amador City was located on the half section in controversy, in the immediate vicinity of said mines, in 1851, and then had a population of about seventy-five persons. It contained about three hundred inhabitants at the date of the act of March 3, 1853, and now contains about five hundred. It has about one hundred dwelling-houses, two stores, two saloons, one hotel, one post-office, one express office, one telegraph office, one church, and one school-house. It has filed an abandonment of all claim to any portion of the legal subdivisions upon which it is situated, so far as the same conflicts with the claim of either of the mining companies.

The survey of the township lines of said township 7 was completed August 27, 1869. The section lines were run March 10, 1870. The plat was approved September 30, 1870, and filed in the local office October 7, 1870. The State of California on the 4th of November, 1870, sold to Henry Casey the east half of said section 36 for the sum of $400, and the claim to the same is now prosecuted by him or those who claim under him.

Upon these facts, it is conceded by all parties to this contest that each of the said mining companies is entitled to a patent for the lands claimed by it, unless the title for said half section is now vested in the State of California or its grantee. It is also conceded that the claim of Amador City is good and valid, unless in conflict with the title of the State or its grantee.

The local officers rejected the title of the State, and their decision was affirmed by the Commissioner.

The claimant under the State has appealed, and the whole case is now before this Department on its merits. It involves a construction of the act of March 3, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of the pre-emption rights therein, and for other purposes."

In attempting to ascertain the true meaning of this act, I shall assume, as hornbook law, that in every valid grant there must be a grantor capable of making the grant, a grantee capable of taking it, and a thing granted capable of identification with reasonable certainty; that all grants made by the General Government to individuals, corporations, or States are to be construed strictly against the grantee, and that nothing passes by implication; that the intent of the law-makers is to govern, and that such intent is to be gathered from the entire act.

In the further examination of this case I propose to consider the following inquiries:

First. When does title vest in the State to sections 16 and 36 under said act?

Second. Does the seventh section except from the grant, land upon which settlement has been made prior to survey for other purposes than pre-emption appropriation?

Third. Does the grant include mineral lands in sections 16 and 36?

First. When does title vest in the State to sections 16 and 36, under said act? Section 6 of the act reads as follows: "That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections 16 and 36, which shall be, and hereby are, granted to the State for the purposes of public schools in each township, and with the exception of land appropriated under the authority of this act or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the pre-emption laws of fourth September, eighteen hundred and forty-one," etc.

It is claimed by appellant that this section contains a grant *in pre senti* to the State, taking effect from the date of the act, upon all tracts afterward located by Government survey on sections 16 and 36 in each township, and that complete title was vested in the State to the same on the 3d of March, 1853, and that Congress

thereafter had no power to provide a way for a different disposition of any such lands. On the other hand it is claimed, on behalf of the mining and town-site companies, that the grant, though in words *de presenti*, was in fact a grant in the nature of a float, taking effect to vest title upon no specific tracts until survey, and that, until such survey, Congress had power to make other and different disposition of the land.

The power of Congress to change, modify, alter, or repeal the grant in question at any time prior to the date when title vests in the State, will not, I think, be questioned, and it is equally clear that after title has once vested, Congress has no further power to alter, modify, or change the grant. It is evident, therefore, that, with reference to this branch of the case, it is only necessary to inquire whether title to sections 16 and 36 vested in the State prior to the act of July 26, 1866. If it did, then Congress had no power to dispose of the land in the manner pointed out in that act; if it did not, then the title of the mineral claimants is good and patents must issue to them for the tracts claimed.

In my opinion, the sixth section of the act of 1853 should be construed as a grant to the State *in presenti*, in the nature of a float, taking effect upon specific tracts when the same are surveyed by the United States, and not before. The grant is in words, *de presenti*, but until survey there are no tracts or parcels of land in existence answering to the calls of the grant. A beneficial interest under it can only ensue to the State when the United States, in extending the lines of the public surveys, sets apart certain tracts and designates them as sections 16 and 36. It will not be denied that Congress had the legal power, no matter what may be said of the political obligation of the Government, to provide that this land should never be surveyed, or that in surveying it a different method should be adopted than that now in use, and no such tracts as sections 16 and 36 be set apart. Would not the passage of such an act have operated to entirely defeat the grant to the State? The grant calls for certain tracts by recognized technical designations. No such tracts could be found, and the State would be without remedy to compel the Government to create them. A like effect would be produced by the refusal of the executive officers of the Government to extend the surveys. The State would be indefinitely without beneficial interest in the grant. Of course the happening of the contingency I have mentioned could hardly for a moment be apprehended, for the United States is, in good faith to the State, and in the performance of its political obligations, bound within reasonable time, in the extension of the public surveys, to set apart the tracts granted; but I refer to it to show the nature of the grant in the State and its liability to defeat before survey.

I think the grant is in nature the same as that usually made by

Congress to railroad companies to aid in the construction of their roads. These grants are generally for a certain number of sections, designated by odd numbers on each side of the road, with a provision for indemnity selection in case any of such sections shall have been sold or otherwise disposed of prior to the definite location of the line. The highest judicial authority (Railroad *vs.* Smith, 9 Wallace, 99; Railroad *vs.* Fremont Co., 9 Wallace, 90) has repeatedly held that these grants did not vest any right in the companies to specific sections until the line of the road was definitely fixed on the face of the earth. The grant to California by the act of 1853 is similar. It is for certain sections designated by numbers, the precise location of which cannot be definitely ascertained until survey. The grant in both becomes certain upon the happening of a contingency; in the former by definite location; in the latter by survey. In the railroad cases the Supreme Court holds that title to specific tracts vests only on the happening of this contingency that makes the grant certain as to location. Why should not the same rule be applied to the grant to the State and the title held to be vested upon the happening of the contingency that makes that grant certain as to location?

In the case of Gaines *et al. vs.* Nicholson, (9 How., 365,) passing upon the right of the State of Mississippi to school sections under an act (2 Stat., 229) reserving section 16 in each township for the support of schools, and two subsequent acts providing for indemnity to the State for loss of same by reason of interference with foreign grants and for leasing such lands for the support of schools, the Supreme Court said: "The State of Mississippi acquired a right to every sixteenth section by virtue of these acts on the extinguishment of the Indian right of occupancy, the title to which in respect to the particular sections became vested, if vested at all, *as soon as the surveys were made and the sections designated.*"

The case of Cooper *vs.* Roberts, (18 How., 173,) although cited and relied upon by counsel for the State, seems not to sustain their position, but rather follows and affirms the principles enunciated in Gaines *vs.* Nicholson.

The United States, in her compact with the Territory of Michigan on her admission to the Union as a State, ratified July 25, 1836, appropriated to the State section 16 in each township for the benefit of schools. The land in controversy was surveyed in the summer of 1847, and designated as section 16. The right of the State to the same was contested by certain mining claimants asserting rights under a purchase from the Government of lead mines, under the act of March 1, 1847, to whom a patent had issued reserving the right of the State. The court first examined the history of the usual grants to the States, upon their admission to the Union, for the benefit of schools, showing that these gifts

were the result of a cherished policy on the part of the Government for the encouragement of popular education, and declaring that the compact with the States did not except mineral lands from the operation of the grant. The court then said: "We agree that, until the survey of the township and the designation of the specific sections, the right of the State rests in compact, binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach, and, *if there is no legal impediment*, the title of the State becomes a legal title." The court then passed to the consideration of the question whether any such "legal impediment" was created by the act of 1847, and decided that there was not, *for the reason that said act expressly excepted section* 16 *from its operation.* The court then further inquired whether the execution of a lease to the mineral claimants by the Secretary of War, with the right of renewal upon the lessees' compliance with certain conditions, upon which lease the claimants, having continued in possession and complied with conditions, were allowed to make entry under the act of 1847, was a legal impediment preventing the title from vesting in the State, and held that it was not such an impediment for the reason that the claim of the company was not perfect under the lease, the act of 1847, and the act of September, 1850, (9 Stat., 472.) The court said: "Hence had there been *a legal impediment* to the execution of the compact with Michigan, enacted either by the second section of the act of 1847, which separated for some purposes the mineral from the public lands, or by the privileges granted to the lessees or their assigns in the third section of that act, it was removed by the repealing clause of the act of 1850, and the noncompliance with the conditions on which the privileges depended."

It is thus seen that even in the case of a compact between the United States and the State of Michigan, duly ratified by the State, (a much stronger case than that of the simple grant, by an ordinary act, to the State of California,) the Supreme Court recognized the power of Congress, by subsequent legislation, to interpose a legal impediment to the title to school sections vesting in the State upon survey. There was no intimation that this power of Congress was doubted by the court. It was plainly recognized in every inquiry, and the title of the State was affirmed *on the sole ground that no such impediment existed.*

In the case of Kissell *vs.* Saint Louis Public Schools, (18 How., 19,) in discussing the right of the school commissioners of Saint Louis to certain out-lots, town lots, &c., reserved for the use of schools by the act of June 13, 1812, (2 Stat., 148,) and the confirmatory act of January 27, 1831, (4 Stat., 435,) which said lots

were to be surveyed under the provisions of the first mentioned act, the court said: "Our opinion is that the school lands were in the condition of Spanish claims after confirmation by the United States, without having established and constructed boundaries made by public authority, and which claims depended for their specific identity on surveys to be executed by the Government. The case of West *vs.* Cochran (17 How. 413), lays down the dividing line between the executive and judicial powers in such cases; to wit, that until a designation, accompanied by a survey or description, was made by the surveyor-general, the title attached to no land, nor had a court of justice jurisdiction to ascertain its boundaries."

In the case of Van Valkenberg *vs.* McCloud (21 Cal. S R. 330) the Supreme Court of California, in construing the five hundred thousand acre grant to the State, under the act of Congress of September 4, 1841, (5 Stats., 453,) held that selections could be made thereunder prior to the survey of the land, subject to subsequent change to conform to the Government lines, but this decision was overruled in the subsequent cases of Terry *vs.* Megerle, (24 Cal. 624,) Grayson *vs.* Knight, (27 Cal., 507,) and Middleton *vs.* Lowe, (30 Cal., 596.) In the latter case, referring to the decision in Grayson *vs.* Knight, the question being one relating to the right of the State to sections 16 and 36, under the act of 1853, the court said: "The reasons operating to prevent the State or her vendee from acquiring a title by the aid of a selection made, as in that case before the congressional survey, are equally cogent to show that title to any particular parcel of the lands granted for the purposes of public schools, does not vest in the State until such survey has been made. * * * * It thus appears that the grant to the State has not attached to the land in controversy, (section 36,) both because of the exception in the act of Congress in favor of private grants, and because the lands have not been surveyed by the United States."

The case of Higgins *vs.* Houghton, relied upon by counsel to sustain the claim of the State, seems rather, upon a careful examination, to sustain an opposite view of the law from that contended for. The case involved a question as to the right of the State under the act of 1853 to sections 16 and 36, and the court said: "We consider that in the grant to California of March 3, 1853, the power of locating the quantity granted, one thousand two hundred and eighty acres, in effect in two parcels in every township, was reserved to the Government, and as fast as townships thereafter were surveyed and sectionized, that the State became the owner of the sixteenth and thirty-sixth sections absolutely, not only as to quantity, but as to position also. Township No. 13 was surveyed and properly subdivided subsequent to the grant and prior to May 20, 1861; and since the date of that occurrence,

the State, by the effect of the grant, and by the law of the event, has been and is now the absolute and several owner of the sixteenth and thirty-sixth sections of that township as against the Government. If there is any legislation by Congress prior to the grant which would interfere with the conclusion, as the objection in effect supposes, it has not been brought to our notice, and if there has been any legislation since the grant that conflicts with the conclusion, it must be null and void, unless, indeed, it has been acceded to by the grantees." The court here distinctly holds that, when township No. 13 was surveyed and properly subdivided, the State, by the effect of the grant and the law of the event, acquired an absolute and several ownership to the sixteenth and thirty-sixth sections. This is what I hold to be the true interpretation of the act, and I have no doubt that, after such survey, the title of the State in agricultural lands was vested and beyond the reach of Congress. I do not understand the reference by the court to possible legislation of Congress to mean anything more than that any subsequent legislation attempting to interfere with this vested right would be null and void.

I find strong support for the view I have expressed, in other portions of the act of March 3, 1853, and in contemporaneous legislation. The seventh section provided that where the sixteenth and thirty-sixth sections should *be reserved for public uses before the same should be surveyed*, other land should be selected by the proper authorities of the State in lieu thereof. At the passage of the act no reservations of land for public uses in California, or comparatively none, had been made. The public lands were unsurveyed, and reservations would be needed for light-houses, forts, arsenals, fortifications, and Indian reservations. There were then over 60,000 Indians in the State, and provision would necessarily be required for them. In fact Congress did provide for five Indian reservations in California, of 25,000 acres each, on the very day this act was passed, (10 Stats., 238.) Is it for a moment to be supposed that Congress would by the sixth section give to the State an absolute vested right in all lands that should fall upon sections 16 and 36, and in the very next section provide that it should have no right whatever in any of said sections which might thereafter be reserved, before survey, for public uses, but should be compelled to take other lands in lieu thereof? I cannot believe that it is so intended.

In opposition to the reasons and authorities above set forth, counsel for the State have cited several cases which they claim sustain a different construction of the act, and which I will now consider. The first of these is Rutherford *vs.* Greene, (2 Wheat. 196.) In 1782 the State of North Carolina passed an act by which the State reserved a tract of land for the relief of officers and soldiers in the continental line, and appointed a board of commis-

sioners to set off the lands allotted to each. The tenth section provided "that 25,000 acres of land shall be allotted for, and given to, Major-General Nathaniel Greene." The commissioners allotted 25,000 acres to General Greene, and caused the tract to be surveyed, which was done on the 11th of March, 1783. It was claimed that the words "shall be allotted" did not import a grant, and that the legislature, *after the allotment and survey*, had made a different disposition of the land in controversy, but the court held that the title of Greene was valid Chief Justice Marshall, in delivering the opinion of the court, said: "As the act was to be performed in future, the words directing it are necessarily in the future tense. 'Twenty-five thousand acres of land shall be allotted for and given to Major-General Nathaniel Greene.' Given when? The answer is unavoidable. *When they shall be allotted.* Given how? Not by any future act, for it is not the practice of legislation to enact that a law shall be passed by some future legislature, but given by force of this act." "Nothing can be more apparent than the intention of the legislature to order these commissioners to make the allotment, and to give the land, *when allotted*, to General Greene. * * * * "The general gift of 25,000 acres lying in the territory reserved for the officers and soldiers of the line of North Carolina, had now become a particular gift of the 25,000 acres contained in the survey." * * * "It is clearly and unanimously the opinion of this court that the act of 1782 vested a title in General Greene to 25,000 acres of land to be laid off within the bounds allotted to the officers and soldiers, and that *the survey*, made in pursuance of that act and returned in March, 1783, *gave precision to that title and attached it to the land surveyed.* That his rights are not impaired by the act of 1783 and the entry of appellant, all of which are *subsequent to his survey.*"

It would be difficult for the learned counsel to find a case more in conflict with the doctrine which it is cited to support.

In Lessieur *vs.* Price, (12 How., 59,) the Supreme Court construed the act of Congress of March 6, 1820, (5 Stats., 545,) which enacted "that four entire sections of land be, and the same are hereby, granted to the said State (Missouri) for the purpose of fixing the seat of government thereon; which said sections thall, under the direction of the legislature of said State, be located as near as may be in one body, at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States."

Four sections were selected which were claimed under a New Madrid location, and it became material for the court to fix the time at which title vested in the State to the lands selected. The court said: "The land was granted by the act of 1820; it was a *present grant*, wanting identity to make it perfect; and the legis-

lature was vested with full power to select and locate the land; and we need only here say, what was substantially said by this court in Rutherford *vs.* Greene's Heirs, (2 Wheat., 196,) that the act of 1820 vested a title in the State of Missouri of four sections; and that the selection made by the State Legislature, pursuant to the act of Congress, and the notice given of such location to the surveyor-general, and the register of the local district where the land lay, *gave precision to the title and attached to it the land selected.*" And again: "The next inquiry is as to the date when the land selected attached to the grant. June 28, 1821, the governor of Missouri notified the surveyor-general of the fact that the land had been located by the commissioners, and awaited the action of the legislature, and on the 31st day of December, 1821, the land was accepted by the Legislature. The same act provides for laying off a town and the establishment of the seat of government thereon. And as the commissioners had power to locate, and did so, subject only to legislative sanction of their report, and that report was sanctioned, our opinion is that the acts were concurrent, and that *the title* refers to the first act, and therefore that *the State took title from the 28th of June*, 1821, when the surveyor-general was notified that the location had been made."

Thus it appears that although the court held that the grant was a present one, it also held that title to the particular sections did not vest on the 6th of March, 1820, the date of the act, but did vest on the 28th of June, 1821, the date when the surveyor-general was notified of the selection.

By parity of reason it should be held in the case now under consideration that although the grant to the State by the act of 1853 was a present grant, yet it did not vest title to sections 16 and 36 until a survey had been made which "*gave precision to the title, and attached to it the land surveyed.*"

In How *vs.* The State of Missouri, (18 Howard, 126,) the court held that the grant to the State of section 16 in contest, by act of March 6, 1820, (2 Stats., 547,) adopted by ordinance declaring the assent of the State thereto, July 19, 1820, was not affected by the subsequent confirmation by Congress of a Spanish claim theretofore rejected by the board. It appears, however, that the particular section in contest in that case was surveyed prior to the passage of the act confirming the Spanish claim, and that three of the justices dissented from the opinion of the court, if intended to go further than to hold that although the tenth section of the act of March 3, 1811, prevented title from vesting in the State until final decision by Congress on the claim of Vallé, (Spanish claimant,) yet the act of May 24, 1828, confirming lands to Vallé, operated as such final decision, and excepted from confirmation so much land as was included in section 16 then surveyed.

In the case of Veeder *vs.* Guffey (3 Wis., 520,) it was held that

the act of Congress approved August 8, 1846, took effect upon the admission of the Territory of Wisconsin to the Union as a State; that it vested in the State the title, potentially, to a quantity of land equal to three sections in width on each side of the Fox River, and determined the location of the lands to be the alternate sections on each side of the river, requiring only the ministerial acts of survey, selection, and approval to render the specific parcels which would fall to the State or the United States definite and fixed, and that, by the grant, the State, upon admission to the Union, became seized of one-half of the lands on each side of the Fox River; and, the mode of partition being established by the grant, it was competent for the State to provide modes and terms of sale. It will be noticed that in the act of 1846 are descriptive words very dissimilar from those used in the act of 1853, being as follows: "A quantity of land equal to one-half of three sections in width on each side of said Fox River;" and also that by the second section of the act it is distinctly provided "that, as soon as the Territory of Wisconsin shall be admitted as a State into the Union, all the lands granted by this act shall be and become the property of the State." This express provision of the second section, and the peculiar character of the descriptive words, seemed to have governed the court in its decision as to the time when title vested in the State.

Secretary Stuart, September 10, 1851, (1 Lester, 495,) in passing upon the grant to Michigan of school sections, already referred to, in citing the case of Cooper *vs.* Roberts, (18 How., 173,) said: "I regard it as an absolute grant of every sixteenth section which had not on the 23d June, 1836, been sold or otherwise disposed of, whether then designated by survey or not." This decision was followed by Acting Secretary Otto, July 10, 1867, in a case involving the construction of the act of 1853, under which the State of California claims. In this case the Acting Secretary said: "The sixth section of the act entitled 'An act to provide for the survey of the public lands in California,' &c., approved March 3, 1853, granted to the State of California, of the public lands, whether surveyed or unsurveyed, sections 16 and 36, for the purposes of public schools in each township."

From this quotation it would appear that the Acting Secretary construed the sixth section as though it read "with the exception of sections 16 and 36, which, whether *surveyed* or *unsurveyed*, shall be, and hereby are, granted to the State for the purposes of public schools," &c. I think it should be construed as though it read as follows:

And be it further enacted, That all the public lands in the State of California, whether surveyed or unsurveyed, shall be subject to the pre-emption laws of fourth of September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, except as herein otherwise provided, and with the exception of sections sixteen and thirty-six, which shall be, and hereby are, granted to the State for the purposes of public schools

in each township, and with the exception of lands appropriated under the authority of this act or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title, and the mineral lands.

I have been shown a newspaper report of a late decision of the Supreme Court of California, in the case of Sherman *vs.* Buick, in which that court held that the act of March 3, 1853, vested an absolute title in the State to sections 16 and 36 from the date of the passage of the act, and that Congress thereafter had no power to dispose of said sections before survey. The opinion of the court is very brief. It cites and relies upon the former rulings of the court in the cases therein mentioned, which cases, as I understand them, do not go to the full extent claimed for them.

This decision is not satisfactory to my mind, and I apprehend is not entirely satisfactory to the learned court which pronounced it, as I am informed that a rehearing has already been allowed.

I am satisfied, upon full consideration of all the cases cited, and the exhaustive arguments of the able counsel representing all parties in interest, that the weight of authority is clearly in favor of the construction I have given above.

Second. Does the seventh section except from the grant land upon which settlemnnt has been made prior to survey for other purposes than pre-emption appropriation?

The seventh section of the act of 1853 is in part as follows:

And be it further enacted, That when any settlement by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections before the same shall be surveyed, or when such sections may be reserved for public use or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof.

It is claimed on behalf of the mineral claimants that this section excepts from the operation of the grant all lands in section 16 and 36 upon which a settlement of any kind had been made, prior to survey, by the erection of a building or buildings, or the cultivation of any portion of the land, whether such settlement was made with a view to pre-emption or for entry as town sites, or otherwise. On the part of the State it is claimed that the exception includes only settlements *made with a view to pre-emption*, and that none other would protect sections 16 and 36 from the grant.

The language of the seventh section is not so clear as to be entirely free from doubt, but a careful examination of the terms used, and a consideration of the various objects evidently intended to be accomplished by Congress in its passage, will show, I think, that the exception includes more than simply settlements with a view to pre-emption.

I call attention to the language used, "that where any settlement, by the erection of a dwelling-house, *or* the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections," &c. A person may erect a dwelling-house

on, or he may cultivate, a portion of a tract of land without acquiring a pre-emption claim. Both the erection of a house *and* cultivation are requisite on the part of a pre-emption.

If Congress had intended to limit the settlement to what is technically known as a pre-emption settlement, I think it would have used more apt words to express such intent. It would have said "that where any pre-emption settlement shall be made," &c. It has done no such thing, but, on the contrary, has adopted such a mode of expression as, to my mind, negatives the idea that a pre-emption settlement alone was intended.

To limit the exception to settlements made by pre-emption claimants would be to protect comparatively few of the actual settlements in any of the mining districts, and to award to the State many very valuable and lasting improvements made under authority and sanction of law and the usages of the country. It is a notorious fact that few, if any, settlements in the early days of California were made in any portion of the State for the purposes of agriculture. Emigration was drawn to the State and settlements made almost entirely with a view to developing and working the newly discovered mines. The miners located in villages and small settlements, cultivating the land only so far as was necessary in following their occupation of mining. Under the construction of the act contended for by the State, none of the settlements or improvements so made were protected from the grant, except, perhaps, town sites upon purely agricultural lands. Is it reasonable to suppose that Congress intended to protect isolated pre-emption claimants, and at the same time grant to the State the valuable improvements of miners, and in some instances include whole villages in the vicinity of the mines? The eighth section of the act expressly provided that the public lands (not mineral) occupied as towns or villages should not be subdivided or subject to sale or appropriation by settlement under the provisions of the act, but should be subject to the town-site act of May 23, 1844, except town sites on or near mineral lands, the inhabitants of which should have the right of occupancy and cultivation only until such time as Congress should dispose of the same. I do not suppose it will be doubted that this section excepted from the grant to the State any such town sites found by survey upon agricultural land in sections sixteen and thirty-six; but if the construction of sections six and seven, contended for by the State, be allowed, it is clear that a town located on or near mineral lands would pass to the State under the grant. Can it be for a moment supposed that Congress intended to hold out inducements to miners to settle on or near mineral lands in towns and villages, and by the very same act give their improvements away to the State, while protecting some, and these the solitary agricultural settlers?

One of the great objects of the act seems to be in providing for

the disposition of the public lands according to the various elements claiming recognition and to protect each interest created from encroachment by the others The seventh section was intended to protect all settlements made upon the public land before survey from the grant to the State, which, from its peculiar nature as to final position, threatened every settler whose claim or improvements were not bounded by subdivisional lines of public surveys. This intention of Congress would be defeated by the construction contended for by the State.

I am of opinion, therefore, that the seventh section of the act excepts from the grant to the State lands upon sections 16 and 36, upon which any settlement by the erection of a building or buildings, or the cultivation of any portion of the land, has been made prior to survey.

Third. Does the grant include mineral lands in sections 16 and 36?

In my opinion Congress, by the act of 1853, did not intend to grant and did not grant to the State any mineral lands that, by survey, are shown to be in sections 16 and 36. The act was passed soon after the discovery of the great mineral wealth of California had been made. The attention of the country and of Congress was called to the question of the disposition of such lands. No plan had been adopted. Congress for the first time undertook to legislate in regard to the public lands in that State.

A careful examination of the act will show that Congress did not intend to dispose of any of its mineral lands, but contemplated a future disposition of them. The eighth section provides that the inhabitants of towns located on or near *mineral lands* shall have the right of occupation and cultivation "*only until such time as Congress shall dispose of the same.*" It evidently did not then suppose that it was disposing of a considerable portion of them. The act, in a great many of its provisions, very carefully reserves the mineral lands from its operation. Thus in the sixth section it is provided that the mineral lands shall be excepted from the lands subject to the pre-emption laws; in the seventh section it is provided that no person shall obtain the benefits of this act "by a settlement or location on mineral lands," and in the eighth section it is provided that the inhabitants of towns located on or near mineral lands shall have the right of occupation and cultivation only until such time as Congress shall dispose of the same. And in the twelfth section it is provided that the State shall have the right to select two townships, or seventy-two sections, for the use of a seminary of learning: "*Provided, however,* That no mineral lands shall be subject to such selection;" and in the thirteenth section the State is given the right to select ten sections for the purpose of erecting the public buildings of the State: "*Provided, however,* That none of said selections shall be

made of mineral lands." Why all this care and painstaking to exclude mineral lands from these minor provisions if it were intended to give the State mineral lands in the major provision relating to the sixteenth and thirty-sixth sections? I think Congress intended to reserve all the mineral lands from the operation of the act, and that there might be no doubt about this reservation as to the sixteenth and thirty-sixth sections, it expressly provided in the third section, "*that none other than township lines shall be surveyed when the lands are mineral.*" As I have before attempted to show, the grant could not take effect until survey, and this third section, *which must be construed as a part of the act, and in connection with all its other provisions* expressly prohibits the only survey that could possibly locate these sections. It therefore, in connection with the other express reservations, satisfies my mind that Congress did not intend to make a grant of mineral lands to the State, and that those members of Congress who undertook to speak for the committees having the matter in charge were correct when they stated in debate that no mineral lands were granted by the act. (See Cong Globe, vol. 25, pp. 1036–1038.)

I regard the act of July 26, 1866, as providing an exclusive method for appropriating the mineral lands of the United States. It was the first act passed by Congress, and perhaps the first ever passed by any government which undertook to dispose of its mineral lands. It provided, in its first section, "That the mineral lands of the public domain," (which is equivalent to saying all the mineral lands of the public domain,) "both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation, by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

It required every person claiming any mine to occupy and improve the same, and expend thereon in labor or improvements not less than $1000, and to do and perform certain other things. It limited the location of any individual to two hundred feet along the vein, with an additional two hundred feet for discovery, and any association to not more than three thousand feet, and required payment at the rate of $5 per acre. It provided that, when the mineral lands should be surveyed, the Secretary of the Interior might designate and set apart such portions of the same as were clearly agricultural, and that the same should be subject to preemption and sale as other public lands. In short, it adopted a system for the disposition of the mineral lands, and such a system as would give every citizen an equal opportunity to engage in the business of developing them. It was evidently intended to be

the only method by which mineral lands could be appropriated. It made no exceptions in favor of school or other grants.

If the State should obtain two sections in every mineral township, it might establish a mineral system for itself, and one in conflict with that of the General Government. In my opinion Congress never intended to make such a state of things possible.

No surveys of mineral lands were authorized or made until the passage of the act of July 9, 1870, (16 Stat., 217, sec. 16,) and long after the passage of the act of 1866.

I am constrained to hold that no mineral lands were granted by the act of 1853. If I am in error, the State can lose nothing, for she has an easy method of presenting the question for the decision of the Supreme Court, where it will doubtless finally go. If, however, my decision should be in favor of the State, and it should be erroneous, there would be very many cases in which I am unadvised of any way by which the error could be corrected.

I affirm your decision, and herewith return the papers transmitted, with your letter of the 21st of October last.

Very respectfully,

C. DELANO,
Secretary.

Hon. W. DRUMMOND,
Commissioner General Land Office.